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MYRES S. MCDOUGAL DISTINGUISHED LECTURE

THE PROTECTION OF HUMAN RIGHTS UNDER INTERNATIONAL LAW: WILL THE U.N. HUMAN RIGHTS COUNCIL AND THE EMERGING NEW NORM "RESPONSIBILITY TO PROTECT" MAKE A DIFFERENCE?

VED P. NANDA*

I.

I will begin with a tribute to Professor Myres S. McDougal, who was the reason I went to Yale Law School. After receiving an LLM. at Northwestern with Professor Brunson McChesney as my advisor, my years at Yale (1962-65) were the most enjoyable of my student life. An inspiring teacher, a creative scholar, and a lifelong friend, Professor McDougal will always be my role model, and I am deeply honored to give this lecture, established at the University of Denver Sturm College of Law in my mentor's name.

Professor McDougal had attracted brilliant and creative minds to Yale – Harold Lasswell, Egon Schwelb, and Oscar Schachter, among others. Each one of these teachers left a lasting impact on me. Dr. Schwelb taught what I understand was the first ever course on international human rights law in any law school, when the only course materials available were UN documents related to draft international treaties on which Dr. Schwelb was working at the UN Headquarters. While taking that seminar I decided that when I started teaching I was going to introduce human rights as a separate course and my colleagues graciously permitted me to do so here at DU in the 1960s. My passion for human rights goes back to that period.

It is inherent in our being human that no matter who we are and where we live, we are entitled to the enjoyment of basic human rights and fundamental freedoms. And there is universal acceptance of the international law norm that human rights of all, irrespective of their sex, race, ethnicity, religion, language,

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social status, or political preferences and affiliations, must be protected and secured. However, notwithstanding the endorsement of human rights protections so eloquently expressed in the UN Charter, the Universal Declaration of Human Rights, the International Bill of Rights, and numerous treaties, the rhetoric does not match the stark reality. As gross and systematic violations of human rights, including genocide, war crimes, and crimes against humanity, are an everyday occurrence in so many parts of the world, our pious utterances and outcries of "never again" sound like empty slogans.

The killing fields of Cambodia, the genocides in Rwanda and Darfur, and severe violations of human rights in several other countries including Somalia, Haiti, Bosnia, Kosovo, Ivory Coast, Sierra Leone, Liberia, and the Congo, constantly remind us that the world community has yet to institute effective mechanisms to prevent and deter these shameful blots on humanity. Nor are there adequate means available to stop these tragedies once they unfold.

How do we explain this anomaly—numerous norms prescribing specific conduct, states consenting to such prescriptions, and still the ongoing, persistent, and systematic atrocities and violations blatantly in disregard of these norms all over the world? The problem no doubt lies with inadequate implementation, coupled with the lack of political will, for theoretical or perceptual differences today on how universal or culturally relative these rights are, or on their content, are rather muted. And the underlying cause remains the current state-centered international system, under which each state jealously guards its sovereignty and often invokes the doctrine of non-intervention in its internal affairs.

The twin challenges, therefore, for human rights scholars and practitioners, and for politicians and statesmen alike, are: (1) to ensure that the existing norms on human rights protection are further strengthened, that the existing institutional framework is made effective, and that there are adequate processes in place to provide suitable remedies to the victims and to bring the perpetrators to justice; and (2) to redouble our efforts to create a keen awareness of the enormity of the challenge and to establish a culture in which decision makers are motivated, and indeed compelled, to make sufficient resources available and to take the necessary action—multilateral, regional, bilateral, and even unilateral—to prevent atrocities and violations, to take effective action to stop and deter them, and to provide redress to the victims when such violations occur.

The preference is, of course, to prevent and deter violations of human rights and to respond effectively to stop them by non-forceful means, but, if it becomes necessary and only as a last resort, even by the use of force and in accordance with international law norms. Problems with unilateral use of force are well known. Abuses in the past remind us that they are likely in the future, as well, unless adequate safeguards exist. It is, however, regrettable that the world community failed to take effective action to address humanitarian disasters such as Rwanda and Darfur. Several countries have even shied away from calling them genocides because under the Genocide Convention states are obligated to prevent genocide and to punish the perpetrators.

These preliminary remarks set the stage for my discussion of a few recent developments the world community has undertaken to strengthen the existing international machinery for the protection of human rights. These are the establishment of the Human Rights Council to replace the U.N. Commission on Human Rights and the adoption of a new international law norm by the U.N., the *Responsibility to Protect.* I will, however, not comment on international humanitarian law, a very important subject indeed, especially in light of the abuses in Abu Ghraib and Guantánamo.

II.

The international human rights movement is of relatively recent origin. However, in a short time it has blossomed into a developed body of international human rights law, with the establishment of necessary institutions for its implementation and enforcement. As the movement is rooted in the world community's response to the excesses inflicted upon humanity by the Nazi and Fascist regimes during the Second World War, the founders of the United Nations ensured that the Charter would reflect the close relationship between international peace and security and international human rights. Thus, the first two goals embodied in the Preamble of the U.N. Charter are: "to save succeeding generations from the scourge of war" and "to reaffirm faith in fundamental human rights, the dignity and worth of the human person, [and] in the equal rights of men and women and of nations large and small...."[1] Article 1 of the Charter lists among the purposes of the U.N. "[t]o achieve international co-operation in... promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[2]

Article 55 mandates that the United Nations promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[3] This is followed by a pledge by all U.N. Member States "to take joint and separate action in co-operation with the Organization for the achievement of" the purpose stated above.[4]

Although there was no provision in the U.N. Charter on protection of human rights, in 1946, soon after it was formed, the United Nations created the U.N. Commission on Human Rights.[5] Also, the U.N. began work on drafting an instrument enumerating basic human rights, whose culmination was the Universal Declaration of Human Rights.[6] The Declaration, adopted by the General Assembly as a resolution in 1948, specifies civil and political, as well as economic, social, and cultural rights. The next step was to codify these rights in a treaty form

1. UN Charter, Pmbl.

2. *Id.* art. 1, para. 3.

3. *Id.* art. 55(c).

4. *Id.* art. 56.

5. *Id.* art. 68. Under art. 68 of the U.N. Charter, the U.N. Economic and Social Council (ECOSOC) was empowered to set up a commission "for the promotion of human rights."

6. Universal Declaration of Human Rights, G.A. Res. 217A(III), at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/818 (Dec. 10, 1948). *See generally*, Oscar Schachter, *The Genesis of the Universal Declaration: A Fresh Examination,* 11 PACE INT'L L. REV. 51 (1999).

because as a resolution of the General Assembly the Universal Declaration was not binding on states. The framers understood this, as Eleanor Roosevelt, the U.S. Representative on the U.N. Commission and its Chair, called the Declaration "a statement of principles... setting up a common standard of achievement for all peoples and all nations."[7] She further stated that the Declaration was "not a treaty or international agreement... impos[ing] legal obligations."[8] The process was protracted because of the ensuing Cold War and the resulting ideological conflict between the then-super powers the U.S. and the Soviet Union. Eventually, however, in 1966 negotiators agreed on two separate conventions, the International Covenant on Civil and Political Rights[9] and the International Covenant on Economic, Social and Cultural Rights,[10] both of which came into force in 1976. The Universal Declaration, together with the two covenants, is popularly known as the International Bill of Rights.[11]

The period since 1976 has witnessed great strides in the development of international human rights law as an impressive body of norms, institutions, and procedures has transformed the subject. Regional human rights machinery exists in Europe, the Americas, and Africa, and is in the formative stage in Southeast Asia, complementing the U.N. machinery created to promote and protect human rights and to provide effective remedies. Customary international law has also played a significant role in this process.

It would have been inconceivable sixty years ago to envisage the development and progress of international human rights law we see today. To illustrate, numerous international agreements have created a wide range of international human rights norms, treaty bodies have been established to monitor implementation by member states of their treaty obligations, and an ever-growing body of soft law—emerging international human rights guidelines, principles, and norms—has developed. All these developments are of great significance for every student of international human rights law.

In the U.N. system, the Office of the High Commissioner for Human Rights, a part of the United Nations Secretariat, acts as the principal focal point of human rights research, education, public information, and human rights advocacy activities.[12] It offers leadership in educating and empowering individuals and assisting states in upholding human rights and supports the work of the U.N. human rights mechanisms, such as the Human Rights Council and the treaty

7. Eleanor Roosevelt, *quoted in* John Humphrey, *The UN Charter and the Universal Declaration of Human Rights, in* THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 39, 50 (Evan Luard ed., 1967).

8. *Id.*

9. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-20 (1978), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976).

10. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (*entered into force* 3 Jan. 1976).

11. Nadine Strossen, *United States Ratification of the International Bill of Rights: A Fitting Celebration of the Bicentennial of the U.S. Bill of Rights*, 24 U. TOL. L. REV. 203, 203 (1992).

12. The website is http://www.ohchr.org, for more information.

bodies. Equally important, it promotes both the universal ratification and the implementation of the major human rights treaties and respect for the rule of law and ensures the enforcement of universally recognized human rights norms.

As I have previously written on the role of the Office of the High Commissioner and the need to strengthen it,[13] I will not revisit that subject here. Also, while the development of human rights norms through treaties, customary international law and "soft law," and the existing machinery for implementation and enforcement of international human rights are indeed most important subjects, I leave their review for another day.

III.

The U.N. Human Rights Council was established on March 15, 2006, to replace the U.N. Human Rights Commission.[14] During the first two decades of its existence, the Commission was without authorization to provide any redress to those who communicated that their human rights had been violated. This changed in 1967 when ECOSOC authorized it to examine relevant information pertaining to gross violations of human rights and to conduct studies of situations which revealed a consistent pattern of violations.[15] But as the communications and complaints remained confidential the Commission could not refer to their substance nor did it have any guidelines to consider or analyze those communications. Consequently, three years later, in 1970, ECOSOC did provide procedures for considering and analyzing such communications.[16] Under this complaints mechanism, which remained confidential, submissions were authorized by individuals, groups, or nongovernmental organizations (NGOs). The Commission could consider allegations of widespread patterns of gross violations of human rights in any country.

In addition, thematic procedures were also instituted to address broader human rights issues, ranging from disappearances, torture, arbitrary detention, and extrajudicial executions, to the right to health, education, and the welfare of internally displaced persons and minorities. The country-specific procedures and thematic procedures are together called "special procedures," and they establish mechanisms to address either specific country situations or thematic issues in all parts of the world.[17] They are undertaken by either an individual, who is called a special rapporteur, special representative of the Secretary-General, or an

13. Ved P. Nanda, *2005 Sutton Colloquium: Foreword: The Global Challenge of Protecting Human Rights: Promising New Developments*, 34 DENV. J. INT'L L. & POL'Y 1, 7-10 (2006).

14. The Human Rights Council was established by G.A. Res. 60/251, U.N. Doc. A/RES/60/251 (Mar. 15, 2006).

15. ECOSOC Resolution 1235 provided the authorization. ECOSOC Res. 1235, at 17, U.N. ESCOR, 42nd Sess. Supp. No. 1, U.N. Doc. E/4393 (June 6, 1967).

16. ECOSOC Res. 1503, at 8, U.N. ESCOR, 48th Sess., Supp. No. 1A, U.N. Doc. E/4832/Add.1 (May 27, 1970).

17. UN WATCH, REFORM OR REGRESSION: AN ASSESSMENT OF THE NEW HUMAN RIGHTS COUNCIL 23 (Sept. 6, 2006), *available at* http://www.unwatch.org/atf-/cf/%7B6DEB65DA-BE5B-4CAE-8056-8BF0BEDF4D17%7D/Reform%20or%20Regression%206%20Sept%202006.pdf [hereinafter UN Watch, *Reform or Regression*].

independent expert, or a working group, usually composed of five members (one from each region).[18]

For several years before its replacement by the Human Rights Council, the Commission's work had come under increasing scrutiny, especially by human rights NGOs. While there was general support and appreciation for the thematic procedures, the Commission faced severe criticism for its seeming obsession with singling out one country, Israel, for condemnation, while showing little concern with egregious violations elsewhere. According to the U.N. Watch, 30 percent of the Commission's resolutions between 1946 and 2006 condemning human rights violations by specific states were against Israel and that percentage had risen to almost 50 in the few years preceding the establishment of the Human Rights Council.[19] In 2005, the Commission adopted eight resolutions under country procedures, four against Israel and the combined total of four against all other states in the world, one each against Belarus, Cuba, Myanmar, and North Korea.[20]

The Commission's credibility had been undermined by such selective condemnation. To illustrate, then-Secretary-General Kofi Annan noted in his March 2005 report to the General Assembly that:

> the Commission's capacity to perform its tasks has been increasingly undermined by its declining credibility and professionalism. In particular, States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others.... As a result, a credibility deficit has developed, which casts a shadow on the reputation of the United Nations system as a whole.[21]

Similarly, a task force of the American Bar Association's Section on International Law, on which I served, stated in its August 2005 report: "The standing of the Commission was severely compromised by the selection of Libya as chair, the re-election of Sudan as a member in the midst of the genocide in Darfur, and the shameful failure of the Commission last year to adopt a resolution clearly condemning that genocide."[22]

Several reform proposals addressing the Council's size, functions, composition, criteria for membership and members' responsibilities, election

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18. As to the range and scope of the mandates, mechanisms, and responsibilities under these procedures, *see, e.g.*, the report of the Commission's concluding session (13-27 Mar. 2006). U.N. Econ. & Soc. Council [ECOSOC], U.N. Comm'n on Human Rights, *Report on the Sixty-Second Session*, at 1-4, Supp. No. 3, U.N. Doc. E/2006/23, E/CN.4/2006/122 (Mar. 13-27, 2006).

19. UN Watch, *Reform or Regression, supra* note 17, at 6 n.3.

20. *Id.*

21. The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 182, *delivered to the General Assembly*, U.N. Doc. A/59/2005 (Mar. 21, 2005) [hereinafter *In Larger Freedom*].

22. Task Force on Reform of the United Nations Commission on Human Rights, A.B.A. Standing Comm. on Law and Nat'l Sec., *Replacing the Commission on Human Rights with a Human Rights Council*, 2005 A.B.A. Sec. Int'l. Law Rep. 9 [hereinafter ABA Report].

process, and status in the U.N. system were made, most calling for a smaller and more nimble body to be elected directly by the General Assembly.[23]

In establishing the Human Rights Council, the General Assembly enhanced the Commission's status by creating it as a subsidiary organ of the Assembly instead of being a subsidiary body of the Economic and Social Council.[24] It is smaller in size, comprising 47 members, compared with the 53-member Commission, and elected directly by a majority vote of the General Assembly.[25] Members are to "uphold the highest standards in the promotion and protection of human rights," and every country is subject to universal periodic review of its human rights obligations and commitments.[26] Under the Resolution, the Council's work is to be guided by the principles of "universality, impartiality, objectivity, and non-selectivity, constructive international dialogue and cooperation...."[27]

The establishment of the Council was consequently widely hailed. Secretary-General Annan said the establishment of the Council would be "remembered as a historical achievement," and he exhorted the Council member to bring about "a change in culture [to replace] the culture of confrontation and distrust, which pervaded the Commission in its final years, [by] a culture of cooperation and commitment, inspired by mature leadership."[28] In his address to the opening session of the Council, the President of the U.N. General Assembly, Jan Eliasson, said, "We are entering a new chapter in the United Nations' work on human rights."[29] Human rights NGOs welcomed the creation of the new Council.[30]

After a review of the Council's first regular session in June 2006 and its first two special sessions in July and August of that year, I found the record to be mixed. On the positive side, it had adopted a draft convention on enforced disappearances and a draft declaration on the rights of indigenous peoples, and had decided to continue the work of the Commission on special procedures and to establish a working group to "develop the modalities of the universal periodic review mechanism."[31]

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23. Among many suggestions, see for example those by Human Rights Watch and Amnesty International *cited in* UN WATCH, *Reform or Regression, supra* note 17, at 8 n.12; ABA Report, *supra* note 22, at 10, 14-15; Task Force on the United Nations, U.S. Inst. of Peace, AMERICAN INTERESTS AND UN REFORM: REPORT OF THE TASK FORCE ON THE UNITED NATIONS, 34-35, June 2005; Secretary-General, Address to the Commission on Human Rights (April 7, 2005), *in In Larger Freedom, supra* note 21, at App. 1, ¶ 6.

24. G.A. Res. 60/251, *supra* note 14, ¶ 1.

25. *Id.* ¶ 7.

26. *Id.* ¶¶ 9, 5(e).

27. *Id.* ¶ 4.

28. Secretary-General, Address to the Human Rights Council on 19 June 2006, *available at* www.un.org/apps/sg/printsgstats.asp?nid=2090.

29. Jan Eliasson, Statement at the first session of the Human Rights Council, Geneva (June 19, 2006), *available at* http://www.un.org/webcast/unhrc/statements/hrc060619pgae.pdf.

30. *See, e.g.*, Press Releases of March 15, 2006, *cited in* UN WATCH, *Reform or Regression, supra* note 17, at 8 n.12.

31. U.N. Human Rights Council, *Report to the General Assembly on the First Session of the Human Rights Council*, at 22, 32, 58 & 73 (June 30, 2006) (establishment of the working group on universal periodic review at 22; Convention text in Annex at 32; text of Declaration in Annex at 58; and

On the negative side, the Council again singled out Israel for censure, requesting the relevant Special Rapporteurs to report on the "Israeli human rights violations in occupied Palestine" to the next session of the Council.[32] I had then concluded:

> The Council's decisions and actions regarding Israel demonstrate that it is continuing to follow the one-sided approach which was a hallmark of the Commission's activities and a major reason for its replacement. Major international human rights NGOs including Amnesty International, Human Rights Watch, and Human Rights First have uniformly condemned the Council's approach. Furthermore, it is hard to explain the Council's indifference to the tragedy in Darfur, for it did not take any action on the subject, although some statements were made by a few countries at the Council meeting.[33]

The Council, however, did adopt a text on Darfur at its second session in November 2006,[34] which noted "with concern the seriousness of the human rights and humanitarian situation in Darfur," and called on "all parties to put an immediate end to the ongoing violations of human rights and international humanitarian law."[35] It is ironic that the Council welcomed "the cooperation established by the Government of the Sudan with the Special Rapporteur on the situation of human rights in the Sudan,"[36] when it had been quite evident for several years that the Sudanese government had not been cooperating with the United Nations to stop the ongoing atrocities perpetrated by the Janjaweed.

The following month, as a promising development, the Council at its fourth special session decided to dispatch a High-Level Mission appointed by the Council president to assess the human rights situation in Darfur.[37] The Mission could not visit Darfur as the Sudanese authorities refused to issue a visa to one of its

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regarding extension of the Commission's mandates, mechanisms, functions and responsibilities at 73).

32. U.N. Human Rights Council, *Report to the General Assembly on the First Session of the Human Rights Council*, at 22, U.N. Doc. A/HRC/1/L.10/Add.1 (July 5, 2006) (The Council took no decision and no action against any country other than Israel. On the Council's decisions on Israel in its first and second special sessions, *see* U.N. Human Rights Council, *Report on the First Special Session of the Human Rights Council*, at 3, U.N. Doc. A/HRC/S-1/3, (July 18, 2006) (S-1/Res.1 Human Rights Situation in the Occupied Palestinian Territory)); U.N. Human Rights Council, *Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Guinea, Indonesia, Iran (Islamic Republic of), Jordan, Kuwait, Kyrgyzstan, Lebanon, Libyan Arab Jamahiriya, Malaysia, Morocco, Pakistan, Palestine, Qatar, Saudi Arabia, Sudan, Syrian Arab Republic and Tunisia: Draft Resolution, The Grave Situation of Human Rights in Lebanon Caused by Israeli Military Operations*, at 1-2, U.N. Doc. A/HRC/S-2/L.1 (Aug. 9, 2006).

33. Ved Nanda, *New U.N. Initiatives for the Protection of International Human Rights* 16 (manuscript to be published in a forthcoming book on human rights by Toda Institute, Honolulu, 2007 (manuscript is on file with the author).

34. U.N. Human Rights Council, *Report to the General Assembly on the Second Session of the Human Rights Council*, at 2/115 (Darfur), U.N. Doc. A/HRC/2/L.11/Add.1 (Nov. 28, 2006).

35. *Id.* at ¶ 2.

36. *Id.* at ¶ 5.

37. U.N. Human Rights Council, *Summary Record of the 4th Meeting*, at 2, ¶4, U.N. Doc. A/HRC/S-4/SR.4 (Jan. 23, 2007).

members. Hence it produced its report based upon visits to neighboring countries and interviews with humanitarian agencies and African Union officials working in Darfur.[38] The report concluded that the human rights situation in Darfur

> remains grave, and the corresponding needs profound. The situation is characterized by gross and systematic violations of human rights and grave breaches of international humanitarian law. War crimes and crimes against humanity continue across the region. The principle pattern is one of a violent counterinsurgency campaign waged by the government of Sudan in concert with Janjaweed/militia, and targeting mostly civilians. Rebel forces are also guilty of serious abuses of human rights and violations of humanitarian law.... [T]he government of the Sudan has manifestly failed to protect the population of Darfur from large-scale international crimes, and has itself orchestrated and participated in these crimes. As such, the solemn obligation of the international community to exercise its *responsibility to protect* has become evident and urgent.[39]

Among specific recommendations of the Mission was one for the Security Council to deploy a proposed U.N./African Union peacekeeping/protection force.[40] The Mission's recommendation for the Sudanese government included the government's ceasing all support for the Janjaweed/militia forces, cooperating fully in the deployment of the proposed hybrid peacekeeping force and with prosecutors at the International Criminal Court, and holding accountable all perpetrators of human rights violations.[41]

The Council took note of the report at its March 2007 session and adopted a resolution expressing deep concern

> regarding the seriousness of the ongoing violations of human rights and international humanitarian law in Darfur, including armed attacks on the civilian population and humanitarian workers, widespread destruction of villages, and continued and widespread violence, in particular gender-based violence against women and girls, as well as the lack of accountability of perpetrators of such crimes.[42]

The Council further decided to establish an experts group on Sudan, which is to work with the African Union and the Sudanese government.[43]

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38. For the report of the Mission *see* U.N. Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council": Report of the High-Level Mission on the Situation of Human Rights in Darfur Pursuant to Human Rights Council Decision S-4/101*, U.N. Doc. A/HRC/4/80 (Mar. 9, 2007).

39. *Id. at ¶ 76 (emphasis in original).*

40. *Id.* at ¶ 77(d).

41. *Id.* at ¶ 77(d)-(e).

42. U.N. Human Rights Council, *Report to the General Assembly on the Fourth Session of the Human Rights Council*, at 13, ¶ ¶ 2-3, U.N. Doc. A/HRC/4/L.11/Add.1 (Mar. 30, 2007).

43. *Id.* at ¶ ¶ 6-7.

In a detailed 71-page report submitted to the Council at its fifth session in June 2007, the experts group reiterated the gravity of the situation in Darfur.[44] The report provided a roadmap for addressing human rights violations there. It recommended that the government of Sudan fulfill its earlier commitments and take immediate action to restore order and to secure human rights in the Darfur region.[45] While the Council deferred action on the report,[46] it nonetheless welcomed the report, requesting the group of experts to continue its work for six months and to submit an update at the next session of the Council in September 2007 and a final report at the Council's following session.[47]

Another promising development related to the Council is the election of its membership in May 2005, and the General Assembly's rejection of Belarus for failing to meet the basic criteria for election to the Council because of its poor human rights record. Instead, the Assembly elected Bosnia-Herzegovina.[48]

As the Human Rights Council concluded its fifth session on June 18, 2007, and its organizational meeting four days later,[49] this marked the end of the Council's first year of operation. The first year's report card still shows a mixed record. The Council's country-specific mandates for Belarus and Cuba were

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44. U.N. Human Rights Council, *Report to the General Assembly on the Fifth Session of the Human Rights Council*, U.N. Doc. A/HRC/5/L.10 (July 9, 2007).

45. The experts group report was presented to the Council by the Special Rapporteur on the Situation on Human Rights in the Sudan and chairperson of the group of experts on June 13, 2007, U.N. Doc. A/HRC/5/L.10, para. 51, 9 July 2007. For the text of the report, see U.N. Doc. A/HRC/5/6, 8 June 2007. The experts group made a number of specific recommendations to the government of Sudan aimed at protection of the civilian population, including internally displaced persons. To illustrate, the experts group called upon the government of Sudan to

> [i]ssue and enforce clear orders to the armed forces and any militias under Government's control that it is prohibited to make civilians or civilian objects (including cultivated land and livestock) the target of attacks or to launch indiscriminate attacks (including burning of villages and aerial bombardments); that such attacks can amount to war crimes and crimes against humanity, that suspects, including bearers of command responsibility, will be investigated and brought to justice, and that any immunities would be waived.

Id. at ¶ 51; U.N. Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council,"* at 12, U.N. Doc. A/HRC/5/6 (June 8, 2007) (Recommendation 1.1.1); U.N. Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council,"* at 44, ¶ 26, U.N. Doc. A/HRC/5/6 (June 8, 2007).

46. U.N. Human Rights Council, *Report to the General Assembly on the Fifth Session of the Human Rights Council*, at ¶ 63, U.N. Doc. A/HRC/5/L.10 (July 9, 2007); U.N. Human Rights Council, *Report to the General Assembly on the Fifth Session of the Human Rights Council*, at 56, § 5/102, U.N. Doc. A/HRC/5/L.11 (June 18, 2007).

47. Follow-up to resolution 4/8 of 30 March 2007 adopted by the Human Rights Council at its 4th session entitled "Follow-up to decision S-4/101" of 13 December 2006 adopted by the Council at its 4th special session entitled "Situation of human rights in Darfur," U.N. Human Rights Council, *Report to the General Assembly on the Organizational Meeting of the Human Rights Council*, at 4, § OM/1/3, U.N. Doc. A/HRC/OM/1/L.11, (June 20, 2007) (adopted without a vote).

48. *Human Rights Council Election (17 May 2007)*, www.un.org/ga/61/elect/hrc.

49. U.N. Human Rights Council, Report to the General Assembly on the Organizational Meeting of the Human Rights Council, U.N. Doc. A/HRC/OM/1/L.11 (June 22, 2007).

discontinued under political pressure, thus eliminating independent experts reviewing their human rights records, while the remaining mandates, which address human rights in Burma, Burundi, Cambodia, the Democratic Republic of Congo, Haiti, Liberia, North Korea, the Occupied Palestinian Territories, Somalia, and Sudan, were renewed.[50] All mandates are to be further reviewed by the Council.[51] The Council continues its disproportionate focus on Israel and its agenda has singled out one situation, *Palestine and Other Occupied Arab Territories*, for the Council's attention, disregarding so many other human rights situations needing special attention, as well.[52]

On the positive side, the Council's institution-building process has had a favorable outcome. Its new institutional machinery includes the universal periodic review mechanism, the special procedures, an Advisory Committee replacing the Commission's Subcommission, and the complaint procedure replacing the confidential 1503 procedure. The universal periodic review of the human rights record of every country begins with the initial members of the Council to be reviewed first,[53] The existing 38 special procedures—mechanisms which address either specific country situations or thematic issues in all parts of the world and are considered the most responsive, flexible, and effective mechanisms within the UN human rights system—are retained. And special procedure mandate-holders will be appointed under an agreed process and set criteria to ensure that individuals with the highest standard of expertise, experience, independence, and impartiality are selected.[54] Further, the mandate-holders are subject to a code of conduct aimed at strengthening their capacity and the effectiveness of the system.[55]

The Council's advisory committee will function as a think-tank of the Council and will be composed of 18 experts elected by the Council who will serve in their

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50. U.N. Human Rights Council, *Report to the General Assembly on the Fifth Session of the Human Rights Council*, at 38-44 (Appendices I-II), U.N. Doc. A/HRC/5/L.11 (June 18, 2007) [hereinafter Human Rights Council's Report on the Fifth Session].

51. *Id.* at 13-15.

52. *Id.* at 25 (agenda item 7). During its Sixth Session, the Council adopted two resolutions critical of Israel. Resolutions 6-18 and 6-19, adopted on September 28, 2007, U.N. Doc. A/HRC/6/L.11 (October 5, 2007). The Council held a Sixth Special Session, at which it again adopted a resolution on Israel, calling for "urgent international action to put an immediate end to the grave violations committed by the occupying Power, Israel, in the Occupied Palestinian Territory . . . ." U.N. Doc. A/HRC/S-6/L.1, operative para. 2 (January 23, 2008). US President George W. Bush in his address to the U.N. General Assembly on September 25, 2007, said:

> The United States is committed to a strong and vibrant United Nations. Yet the American people are disappointed by the failures of the Human Rights Council. This body has been silent on repression by regimes from Havana to Caracas to Pyongyang and Tehran -- while focusing its criticism excessively on Israel. To be credible on human rights in the world, the United Nations must reform its own Human Rights Council.

Available at www.whitehouse.gov/news/releases/2007/09/20070925-4.html.

53. Human Rights Council's Report of the Fifth Session, *supra* note 50, at 4-11 (Annex 1).

54. *Id.* at 11-15.

55. *Id.* at 45-55 (which includes Resolution 5/2 adopted by the Council and the text of the code of conduct).

personal capacity.[56] The confidential complaint procedure, based on the previous "1503 procedure," will address consistent patterns of reliably attested gross violations of all human rights, will be more victim-oriented, and will be assisted by two working groups.[57] The Council is to meet regularly throughout the year and will hold special sessions when needed, according to the newly established rules of procedure.[58]

It is in this context that several human rights NGOs, including Amnesty International, Human Rights Watch, the Carter Center, Open Society Institute, and World Federalist Movement, wrote to Secretary of State Condoleezza Rice, urging the United States to work with other U.N. member states to make the Council strong and effective:

> The disappointments of the Council's first year—such as the discontinuation of consideration of Iran and Uzbekistan under the 1503 procedure and the failure of the Council to address comprehensively the situations in Lebanon and the Occupied Palestinian Territories—should spur the United States not to disengagement, but to greater engagement....
>
> The United States, together with other countries, must invest greater political capital and more staff and resources into making the Council an effective forum for the promotion and protection of human rights. With its long tradition of leadership in human rights, it has an important role to play in helping to ensure that the Council will become the success that the victims of human rights violations all over the world badly need it to be.[59]

As this discussion shows, the Council has failed to meet the expectations of those who envisaged the dawn of a new era of human rights protection with its formation. The United States is reportedly considering withdrawal of its funding for the Council to show its disapproval of the Council's actions.[60] However, the positive aspects noted above demonstrate as well that if members of the Council with strong commitment to human rights make concerted efforts and human rights NGOs keep a vigilant eye and continue to exert pressure, the Council could conceivably reach its potential, which was so eloquently articulated in the General Assembly Resolution establishing it.

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56. *Id.* at 15-18. The advisory council replacing the former Sub-Commission on the Promotion and Protection of Human Rights will be established to support the Council's work.

57. *Id.* at 19-24.

58. *Id.* at 32-37. For the final version of the Human Rights Council's Report to the General Assembly on the Fifth Session of the Council, see U.N. Doc. A/HRC/5/21 (Aug. 7, 2007).

59. *Amnesty International USA Joint Letter*, July 9, 2007, www.amnestyusa.org/document.php?lang=e&id=ENGUSA20070716001.

60. *See* Betsy Pisik, *U.N. Panel Faces Loss of U.S. Funding*, WASH. TIMES., Sept. 11, 2007, at A01.

IV.

The tension between sovereignty and human rights lies at the heart of the Responsibility to Protect concept. Sovereignty, of course, remains sacrosanct in the Westphalian state-centered system. Sovereign equality and territorial integrity are cardinal principles enshrined in the U.N. Charter.[61] Thus, the Charter mandates non-intervention in a state's internal affairs[62] and prohibits the use of unauthorized force[63] as means to ensure that there is no infringement on state sovereignty. The human rights movement—the development and growth of human rights norms, institutions, and processes outlined earlier—lays claim to its genesis in the U.N. Charter, as well.

Reconciling these competing considerations continues to be a daunting task. The struggle began soon after the founding of the United Nations. Apartheid in South Africa, Unilateral Declaration of Independence in Southern Rhodesia, and the expulsion of Asians from Uganda were among the initial challenges the U.N. faced. The genocide in Cambodia led by the Khmer Rouge and the Pol Pot regime intensified the tension. There were other instances.

The debate centered on the concept of humanitarian intervention—coercive intervention by military action against a state to protect people in that state suffering or threatened with genocide and other massive violations of human rights. Invoking articles 2(4) and 2(7) of the U.N. Charter, critics reject unilateral humanitarian intervention, asserting that it is a prohibited intrusion on state sovereignty. Proponents, on the other hand, contend that in order to protect the human rights of those suffering or threatened with genocide and massive violations of that nature, even unilateral use of force is permissible under article 2(4) when the Security Council is paralyzed, there is inaction on the part of regional organizations, and the force is used as a last resort. I should note that humanitarian intervention has indeed been abused in the past and many states with colonial experiences perceive it as undermining their sovereignty and suspect that it is likely to be abused by powerful states. The validity of humanitarian intervention has been challenged on both doctrinal and policy grounds.

During the 1990s the international community helplessly watched grievous assaults on human security. No effective measures were taken to prevent or respond to the genocide in Rwanda and mass murders and other crimes against humanity in many other countries. Critics failed to present any desirable and feasible alternative to humanitarian intervention, and voices seeking international action to protect those suffering from heinous acts within their countries were met with silence. Thus the pertinent question was: how should the international community protect those who need protection within a state when the government is unable to protect them or is complicit?

61. U.N. Charter art. 2, para. 1.

62. *Id.* at para. 7.

63. *Id.* at para. 4.

It is in response to these tragic events of the 1990s that then UN Secretary-General Kofi Annan addressed the dilemma of humanitarian intervention in his Millennium Report to the General Assembly in April 2000.[64] After noting his 1999 call to member states "to unite in the pursuit of more effective policies to stop organized mass murder and egregious violations of human rights," he acknowledged the controversy his comments had generated.[65]

He stated the critics' concerns—that the concept could "become a cover for gratuitous interference in the internal affairs of sovereign states"; that "it might encourage secessionists movements deliberately to provoke governments into committing gross violations of human rights in order to trigger external interventions"; and that "there is little consistency in the practice of intervention ... except that weak states are far more likely to be subjected to it than strong ones."[66] He then recognized the importance of these arguments and of the principles of sovereignty and non-interference, which offer "vital protection to small and weak states," but said, "to the critics I would pose this question: if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that affect every precept of our common humanity?"[67]

He added that, while humanitarian intervention "is a sensitive issue, fraught with political difficulty and not susceptible to easy answers,"

> [w]here such crimes occur and peaceful attempts to halt them have been exhausted, the Security Council has a moral duty to act on behalf oft he international community. The fact that we cannot protect people everywhere is no reason for doing nothing when we can. Armed intervention must always remain the option of last resort, but in the face of mass murder it is an option that cannot be relinquished.[68]

I quote Kofi Annan extensively here because the genesis of the Responsibility to Protect concept is in response to his challenge, which he subsequently reiterated for the Security Council members. That was in his address to the General Assembly in 2003, in which he urged the Council members

> to engage in serious discussions of the best way to respond to the threats of genocide or other comparable massive violations of human rights.... Once again this year, our collective response to events of this type—in the Democratic Republic of the Congo and in Liberia—has been hesitant and tardy.[69]

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64. The Secretary-General's Millennium Report, *We the Peoples: The Role of the United Nations in the Twenty-First Century,* 47-48, U.N. Doc. A/54/2000 (Apr. 3, 2000), *available at* www.un.org/millennium/sg/report/ch3.pdf.

65. *Id.* at 47.

66. *Id.* at 47-48.

67. *Id.* at 48.

68. *Id.*

69. The Secretary-General's Address to the General Assembly, Sept. 23, 2003, www.un.org/apps/sg/printsgstats.asp?nid=517.

In September 2005, the U.N. World Summit, which brought together heads of state and government from almost all member states, answered the Secretary-General's call by accepting each individual state's "responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes...."[70] The Summit further resolved:

> The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means... to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council,... on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[71]

Before analyzing the nature of the commitment, it would be useful to provide the context to the Summit agreement. A number of factors combined to prompt several initiatives by think-tanks[72] and governments in search for an effective response to massive violations of human rights within many states in the 1990s in which the government either failed to prevent the violations or was involved in causing the harm. These factors included the ineffective international response and the Secretary-General's challenge to the international community.

The governments of Denmark,[73] The Netherlands,[74] Sweden,[75] and the United States[76] were among those engaged in this quest. Also, during the mid 1990s the Special Representative of the Secretary-General on Internally Displaced Persons, Francis Deng, had already redefined sovereignty as responsibility.[77] It was, however, a report entitled "The Responsibility to Protect," of the International Commission on Intervention and State Sovereignty (ICISS), established by the

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70. World Summit Outcome, G.A. Res. 60/1 ¶ 138, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) [hereinafter Summit Outcome Document].

71. *Id.* at ¶ 139.

72. *See, e.g.*, COUNCIL ON FOREIGN RELATIONS, HUMANITARIAN INTERVENTION: CRAFTING A WORKABLE DOCTRINE (Alton Frye ed., 2000).

73. DANISH INSTITUTE OF INTERNATIONAL AFFAIRS, *Humanitarian Intervention: Legal and Political Aspects* (1999).

74. ADVISORY COUNCIL ON INTERNATIONAL AFFAIRS AND ADVISORY COMMITTEE ON ISSUES OF PUBLIC INTERNATIONAL LAW, *Humanitarian Intervention* (2000).

75. INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED (Oxford University Press 2000).

76. U.S. DEPARTMENT OF STATE, INTER-AGENCY REVIEW OF U.S. GOVERNMENT CIVILIAN HUMANITARIAN AND TRANSITION PROGRAMS (2000), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB30/index.html#doc.

77. Francis M. Deng, *Frontiers of Sovereignty*, 8 LEIDEN J. INT'L L. 249 (1995); FRANCIS M DENG ET AL., SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA (The Brookings Institution 1996).

government of Canada in cooperation with a group of major foundations, which proved most influential in shaping the concept.[78]

Rejecting the traditional language of the sovereignty-intervention debate—the "right of humanitarian intervention"[79] or the "right to intervene"—the Commission shifted the debate to focus instead on the "responsibility to protect," suggesting that the proposed change reflected "a change in perspective, reversing the perceptions inherent in the traditional language."[80] The Commission clarified that the term "the responsibility to protect" implies focusing on the point of view not of those who may be considering intervention but of those seeking or needing support.[81] It explained that the Responsibility to Protect comprises three distinct responsibilities—the responsibility to prevent;[82] the responsibility to react, which may include in extreme cases military intervention;[83] and the responsibility to rebuild after military intervention.[84] It further explained that the primary responsibility to protect "rests with the state concerned, and that it is only if the state is unable or unwilling to fulfill this responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place.... Thus, the [concept] is more of a linking concept that bridges the divide between intervention and sovereignty...."[85]

The Commission conducted roundtable discussions around the world and consulted a wide range of academic experts. In light of its goal of providing a new

78. International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Dec. 2001), *available at* http://www.iciss.ca/pdf/Commission-Report.pdf [hereinafter ICISS Report].

79. There is voluminous literature on humanitarian intervention. *See, e.g.*, HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS (J.L. Holzgrefe & Robert O. Keohane eds., 2003); V.S. Mani, *Humanitarian Intervention Today*, 313 RECUEIL DES COURS (2005); SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER (1996); FERNANDO TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (2d ed. 1996); Mohammed Ayoob, *Third World Perspectives on Humanitarian Intervention and International Administration*, 10 GLOBAL GOVERNANCE 99 (2004); Ruth E. Gordon, *Intervention by the United Nations: Iraq, Somalia and Haiti*, 31 TEX. INT'L L. J. 43 (1996); Christopher C. Joyner, *"The Responsibility to Protect": Humanitarian Concern and the Lawfulness of Armed Intervention*, 47 VA. J. INT'L L. 693 (2007); Richard B. Lillich, *The Role of the U.N. Security Council in Protecting Human Rights in Crisis Situations: U.N. Humanitarian Intervention in the Post-Cold War Era*, 3 TUL. J. INT'L & COMP. L. 1 (1995); James A.R. Nafziger, *Humanitarian Intervention in a Community of Power*, 22 DENV. J. INT'L L. & POL'Y 219 (1994); Ved Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti -- Revisiting the Validity of Humanitarian Intervention Under International Law, Pt. I*, 20 DENV. J. INT'L L. & POL'Y 305 (1992); Ved Nanda et al., *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia -- Revisiting the Validity of Humanitarian Intervention Under International Law, Pt. II*, 26 DENV. J. INT'L L. & POL'Y 827 (1998); W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3 (2000); Yogesh K. Tyagi, *The Concept of Humanitarian Intervention Revisited*, 16 Mich. J. Int'l L. 883 (1995); Thomas G. Weiss, *The Sunset of Humanitarian Intervention? Responsibility to Protect in a Unipolar Era*, 35 SECURITY DIALOGUE 135 (2004).

80. ICISS Report, *supra* note 78, at ¶ 2.29.

81. *Id.*

82. *Id.* at ¶ 3.1-3.43.

83. *Id.* at ¶ 4.1-4.43.

84. *Id.* at ¶ 5.1-5.31.

85. *Id.* at ¶ 2.29.

approach to military intervention on human protection grounds, the Commission proposed a "just cause threshold" for such intervention to be "serious and irreparable harm" to human beings, such as "large scale loss of life, actual or apprehended, with genocidal intent or not," or "large scale 'ethnic cleansing,' actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape."[86]

Next, the Commission enumerated four precautionary principles to guide the use of force once the above-mentioned threshold has been reached: (1) right intention, the primary purpose of which must be to "halt or avert human suffering";[87] (2) last resort—military intervention can only be justified when all diplomatic and non-military avenues have been explored;[88] (3) proportional means—military intervention should be the minimum necessary to achieve the humanitarian goal;[89] and (4) reasonable prospects of success in halting or averting the suffering that justified the intervention, "with the consequences of action not likely to be worse than the consequences of inaction."[90]

As to the right authority to authorize military intervention, the Commission identified the U.N. Security Council, suggesting that "[t]he task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has."[91] On the use of the veto by the five Permanent Members of the Security Council, the Commission said that they should agree not to use it where their vital state interests are not at stake if otherwise there is majority support for such action.[92]

In case of inaction by the Security Council, the Commission offered alternative options—the "Uniting for Peace" procedure, under which the General Assembly considers the matter in an emergency special session;[93] action by regional organizations "subject to their seeking subsequently authorization from the Security Council"; or other means by concerned states "to meet the gravity and urgency of [the] situation," in which case "the stature and credibility of the United Nations may suffer...."[94]

The response to the Commission's proposal was initially mixed among states[95] as well as nongovernmental organizations[96] and scholars.[97] It is

86. *Id.* at ¶ 4.18-4.19.
87. *Id.* at ¶ 4.33.
88. *Id.* at ¶ 4.37.
89. *Id.* at ¶ 4.39.
90. *Id.* at XII; *see also id.* at ¶ 4.41.
91. *Id.* at xii.
92. *Id.* at 51.
93. *Id.* at xiii.
94. *Id.*
95. *See generally* Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit,* 20 ETHICS & INT'L AFFAIRS 143, 151 (2006) [hereinafter *Whither the Responsibility to Protect*].
96. *See* William R. Pace and Nicole Deller, *Preventing Future Genocides: An International Responsibility to Protect,* 36.4 WORLD ORDER 15, 21 (2005).
97. *See, e.g.,* Mohammed Ayoob, *Third World Perspectives on Humanitarian Intervention and*

noteworthy that the Constitutive act which created the African Union authorizes the A.U. to undertake humanitarian intervention, although the A.U. has never used this authority.[98] Also, the language of authorization is accompanied with qualifications and is conceivably ambiguous.[99]

Kofi Annan established a High-Level Panel in September 2003 with the task of examining the challenges to international peace and security and the contribution the United Nations could make in addressing those challenges more effectively.[100] A year later, the panel endorsed what it said was the "emerging norm" of a collective international responsibility to protect, which was "exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent."[101]

The Panel did not identify alternative sources of authority when the Security Council fails to act but focused instead on making the Security Council "work better than it has."[102] It endorsed the ICISS's "just cause" threshold and its precautionary principles. However, it added "serious violations of international humanitarian law, actual or imminently apprehended" to the Commission's list.[103] It renamed the basic criteria of legitimacy—seriousness of threat, proper purpose, last resort, proper means, and balance of consequences.[104] It recommended that the Security Council and the General Assembly should adopt declaratory resolutions embodying these guidelines for authorizing the use of force.[105] In his March 2005 report, Kofi Annan accepted the Panel's recommendations.[106]

International Administration, 10 GLOBAL GOVERNANCE 99, 104-10 (2004); S. Neil MacFarlane, *et al.*, *The Responsibility to Protect: Is Anyone Interested in Humanitarian Intervention?*, 25 THIRD WORLD Q. 977, 979-81 (2004); Joelle Tanguy, *Redefining Sovereignty and Intervention*, 17 ETHICS & INT'L AFFAIRS 1419 (Spring 2003); David Vesel, *The Lonely Pragmatist: Humanitarian Intervention in an Imperfect World*, 18 BYU J. PUB. L. 1 (2003); Jennifer Welsh, *et al.*, *The Responsibility to Protect: Assessing the Report of the International Commission on Intervention and State Sovereignty*, 57 INT'L J. 489 (2002).

98. *See generally Whither the Responsibility to Protect*, *supra* note 95, notes 57-70 and accompanying text. Article 4 recognizes the "right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity."

99. *Id.*

100. Press Release, Secretary-General, Secretary-General Names High Level Panel to Study Global Security Threats and Recommend Necessary Changes, U.N. Doc. SG/A/857 (Apr. 11, 2003).

101. U.N. General Assembly, *A More Secure World, Our Shared Responsibility -- Report of the High-Level Panel on Threats, Challenges and Change*, U.N. Doc. A/59/565, para. 203 (Dec. 2, 2004).

102. *Id.* para. 198.

103. *Id.* para. 207a.

104. *Id.* para. 207a-e.

105. *Id.* para. 208.

106. Report of the Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, U.N. Doc. A/59/2005 (Mar. 2005).

In June 2005, an influential report entitled *American Interests and UN Reform*[107] was released by a bi-partisan task force established under the initiative of the U.S. Congress. It recommended that the U.S. government "should affirm that every sovereign government has a 'responsibility to protect' its citizens and those within its jurisdiction from genocide, mass killing, and massive and sustained human rights violations."[108] It further urged the U.S. government to call on the U.N. Security Council and General Assembly to affirm such responsibility of every sovereign government.[109] The report said that if the government fails to provide protection, "it forfeits claims to immunity from intervention... if such intervention is designed to protect the at-risk population." In such a case, the "collective responsibility of nations [under the Security Council auspices] to take action cannot be denied." [110]

Under the task force's recommendations, the Security Council's failure to act "must not be used as an excuse by concerned members to avoid protective measures.... Those engaged in mass murder must understand that they will be identified and held accountable."[111] This implies that member states' use of force in extreme cases would be valid even outside the U.N. framework. To illustrate, the report specifically recommended that the U.S. propose to the Security Council that it impose sanctions, including economic sanctions authorized under the U.N. Charter, to stop genocide and mass murder. If these measures do not succeed, the Security Council should consider authorizing military intervention. And what if it does not do so? The task force's answer: "[If] the Security Council is derelict or untimely in its response, states—individually or collectively—would retain the ability to act."[112]

All these reports were available to member states before the World Summit met in September 2005. As already mentioned, the Summit endorsed the emerging norm and the responsibility of each individual state to provide protection, and called upon the international community to assume responsibility to help to protect populations from the specified crimes—genocide, war crimes, ethnic cleansing, and crimes against humanity—and to support the U.N. in establishing an early warning capability.[113]

The timing, however, was not propitious. The Iraq invasion had resulted in Saddam Hussein's overthrow but Iraq continued to suffer from insurgency, violence, and terrorism. One of the rationales for the invasion of Iraq by the United States and United Kingdom was that Saddam Hussein was guilty of perpetrating gross violations of human rights, especially by committing atrocities on the Kurds in the North and the Shiites in the South, and the use of military force

107. Task Force on the United Nations, *American Interests and UN Reform*, U.S. Institute of Peace, 2005.

108. *Id.* at 29.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 32. *See generally id.* at 31-32.

113. Summit Outcome Document, *supra*, note 70, para. 138-139.

to topple his regime was aimed at protecting the population from further abuse. That undoubtedly was a misuse of the concept.

According to Gareth Evans, co-chair of the ICISS and president of International Crisis Group, this misuse was the "biggest inhibitor of all to the ready acceptance of [the Responsibility to Protect] as an operating principle."[114] He argues that even if the threshold issue of the seriousness of the security threat to Iraq's population might have been met, the others, especially that "the results of military action would not be worse than taking no action," was certainly not satisfied,[115] for at the time of the invasion that judgment could not responsibly have been made.

The Document did not include massive violations of human rights or any similar formulation as part of the threshold, thus raising the threshold for intervention. Nor did it contain a provision to the effect that the Security Council has the *obligation* to intervene with the use of force if the national government fails to provide protection, although it recognized the international community's responsibility through the United Nations to use "appropriate diplomatic, humanitarian and other peaceful means" for this purpose.[116] As to the use of force, the states agreed that they are "prepared to take collective action" through the Security Council or regional organizations "on a case-by-case basis... [if] national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[117]

The Summit Document thus reflects some states' resistance to give a blank check to the Security Council to undertake military intervention and on the other hand some states' unwillingness to assume an obligation to act as was recommended by the ICISS. To illustrate, in his address to the General Assembly on September 15, 2005, President Hugo Chávez of Venezuela challenged the Responsibility to Protect doctrine by asking, "Who is going to protect us? How are they going to protect us?" He called it a "very dangerous" concept that "shape[s] imperialism [and] interventionism" in the attempt "to legalize the violation of the national sovereignty."[118]

In response to the Revised Draft Outcome Document,[119] which was released on August 10, 2005, then U.S. Ambassador to the United Nations John Bolton wrote a letter to the President of the General Assembly on August 30, 2005. In it he argued that member states have no obligation or responsibility "of a legal character" to intervene, rejecting the suggestion "that either the United Nations as

114. Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect,* 24 WIS. INT'L L.J. 703, 717 (2006) [hereinafter Responsibility to Protect].

115. *Id.* at 717-18.

116. *Id.*

117. *Id.* at 715.

118. President Hugo Chávez, Speech at 70th UN General Assembly, New York (Sept. 15, 2005), *available at* www.embavenez-us.org/news.php?nid=1745.

119. Revised Draft Outcome Document of the High-Level Plenary Meeting of the General Assembly of September 2005 Submitted by the President of the General Assembly, U.N. Doc. A/59/HLPM/CRP.1/Rev. 2 (Aug. 10, 2005) [hereinafter Revised Draft Outcome Document].

a whole, or the Security Council, or individual states, have an obligation to intervene under international law."[120]

The Document removed the proposed recommendation from the Draft Outcome Document that called on Permanent Security Council members to refrain from using the veto in cases involving the specified violations.[121] It may be recalled that the ICISS had suggested that the Security Council's Permanent Members should abstain from the use of the veto in such cases unless their vital interests are involved.[122] Opponents to any restraint on the use of the veto fall into two camps—those who consider the veto as a tool to prevent interventionism and those who consider any constraint on the veto as limiting their freedom of action. Nor was there any mention in the Document of criteria or standards to guide states in determining when force may be used. Also, the agreement fails to provide any guidance on who has the responsibility to protect if the Security Council does not act because of the use of veto or for any other reason.

Skeptics may not find much that is new in the Summit Outcome Document. They could argue that it adds nothing substantial regarding the use of military force, since the Security Council is authorized under the Charter to use force and the Council has interpreted the qualifier "a threat to international peace and security" pretty broadly. And the language "prepared to take collective action" gives a great deal of leeway to member states.[123] Furthermore, the determination of when a state is "manifestly failing to protect [its] populations" can be subject to varying interpretations.[124]

What the skeptics miss is the importance of the solemn core declaration, reached by consensus among member states that each state has the responsibility to protect its populations from violations of the specified human rights. To accept sovereignty as responsibility represents a major shift from the traditional notion of sovereignty as connoting complete control. Thus no longer can a government hide behind the shield of sovereignty, claiming non-intervention by other states in its internal affairs, if it fails to protect the people under its jurisdiction from massive violations of human rights. The states also agreed on a "just cause" threshold and reaffirmed the Security Council's predominant role for protection purposes when a state fails in its obligation.

Indeed, many of the ICISS's recommendations, especially the guidelines on when legitimately to intervene, were left out in order to ensure the adoption of a consensus document. But the result is an important first step, which should be considered in the nature of a framework agreement. Of course, much more needs to be done before the concept can be operationalized.

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120. Letter from John R. Bolton, U.S. Representative to the U.N., to members of the General Assembly (Aug. 30, 2005), *available at* http://www.responsibilitytoprotect.org/index.php?module=uploads&func=download&fileId=219.

121. Revised Draft Outcome Document, *supra* note 121.

122. ICISS Report, *supra* note 80, para. 6.21.

123. Summit Outcome Document, *supra* note 72, at para. 139.

124. *Id.*

V.

The Security Council took its first step by reaffirming the "provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document Regarding the Responsibility to Protect Populations from Genocide, War Crimes, Ethnic Cleansing and Crimes Against Humanity" in its Resolution 1674 of April 28, 2006, on the protection of civilians in armed conflict.[125] Two months later, then U.N. Under-Secretary-General Jan Egeland said at a Security Council meeting,

> We as the U.N., and you as the Security Council, now have the responsibility to protect as reaffirmed in Resolution 1674. There are too many times when we still do not come to the defence of civilian populations in need [as] we appear to wash our hands of our humanitarian responsibilities to protect lives."[126]

Subsequently, on August 31, 2006, the Security Council called for the rapid deployment of U.N. peacekeepers in Darfur in its Resolution 1706, which incorporated the doctrine as it referred to the "responsibility of the Government of the Sudan, to protect civilians under threat of physical violence."[127]

The General Assembly and the Security Council must adopt guidelines to determine when threats to civilian populations rise to the level requiring Security Council action. Also, guidelines on the legitimate use of force need to be established by these bodies. These are essential prerequisites for the implementation and enforcement of the doctrine. A case in point is the Darfur crisis, which has been ongoing since early 2003. The U.S. President has characterized the atrocities in Darfur, in the words of the Bush administration, "by their rightful name: genocide."[128] Similarly, the U.S. Congress has also called the situation genocide.[129]

There is no dearth of reliable reports on the gravity of the situation in Darfur.[130] For example, in his July 2006 report to the U.N. Security Council on

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125. Resolution 1674 of April 28, 2006 on the Protection of Civilians in Armed Conflict, U.N. Doc. S/RES/1674, para. 4, April 28, 2006.

126. Statement of Under-Secretary-General Jan Egeland at the open meeting of the Security Council on the Protection of Civilians in Armed Conflict, 28 June 2006, *available at* http://ochaonline.un.org/HumanitarianIssues/ProtectionofCiviliansinArmedConflict/DocumentsLibrary/tabid/1142/Default.aspx.

127. U.N. Doc. S/RES/1706, para. 12(a), Aug. 31, 2006. For a review of earlier U.N. resolutions on Darfur, see generally Alex J. Bellamy, *Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention After Iraq*, 19 ETHICS & INT'L AFFAIRS 31 (2005).

128. The White House, *President Bush Discusses Genocide in Darfur, Implements Sanctions*, *available at* www.whitehouse.gov/news/releases/2007/05/print/20070529, May 29, 2007 [hereinafter Bush Implements Sanctions] (adding 31 Sudanese companies to those already under economic sanctions and targeting sanctions against individuals, as well).

129. Darfur Peace and Accountability Act of 2006, P.L. 109-344, 120 Stat. 1869, 1873, at §4(1). In his address to the U.N. General Assembly on September 25, 2007, President Bush reiterated that the atrocities in Darfur amount to genocide: "In Sudan, innocent civilians are suffering repression -- and in the Darfur region, many are losing their lives to genocide." Available at www.whitehouse.gov/news/releases/2007/09/20070925-4.html.

130. *See, e.g.*, Report of the International Commission of Inquiry on Darfur to the United Nations

Darfur, Kofi Annan stated, after providing a brief history of the conflict in the region:

> The notorious Janjaweed, coupled with militia attacks and indiscriminate air bombardment, contributed to the razing and burning of villages, the rape of girls and women, the abduction of children and the destruction of food and water resources. The result has been death, devastation and destruction in Darfur, with more than 200,000 civilian casualties, more than 2,000,000 people displaced in their homes and condemned to misery, and millions more having their livelihoods destroyed.[131]

He further added that the Darfur crisis threatens regional peace and security and that cross-border violence between the Sudan and Chad has exacerbated the humanitarian crisis in the region.[132]

A year later, the Secretary-General's Report on Darfur[133] noted continuing violence and insecurity in Darfur. According to the report, violence against the African Union mission and the United Nations mission, as well as the NGO community in Darfur, had increased. The Secretary-General noted that earlier in 2007 the government of Sudan carried out several air bombardments in Northern and Southern Darfur, ground attacks had occurred against civilian villages, systematic sexual and gender-based violence had continued against the female population of Darfur, attacks against aid workers and their assets had become a daily occurrence,[134] and in the first seven months of 2007 more than 150,000 people had been newly displaced.[135]

In November 2006, as mentioned earlier, the Human Rights Council appointed a High-Level Mission to assess the human rights situation in Darfur,[136] which submitted a report concluding that the international community has a solemn obligation to exercise its responsibility to protect the people of Darfur.[137] Subsequently the Council also adopted a resolution in March 2007 expressing deep concern regarding the serious situation in Darfur and established an Experts Group on Sudan, which reiterated the gravity of the situation in Darfur at the Council's

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Secretary-General, Geneva, Jan. 25, 2005, *available at* www.reliefweb.int/library/documents/2005/ici-sud-25feb; Monthly Reports of the Secretary-General on Darfur to the Security Council, such as those cited in notes 133-136,*infra*; Crisis Group, *Crisis in Darfur* (updated May 2007), *available at* www.crisisgroup.org/home/index.cfm?id=3060&l=1; International Crisis Group, *Getting the UN into Darfur*, Africa Briefing No. 43, Oct. 12, 2006; U.S. Department of State, *Country Reports on Human Rights Practices -- 2006, Sudan*, Mar. 6, 2007, *available at* state.gov/g/drl/rls/hrrpt/2006/78759.

131. U.N. Security Council, Report of the Secretary-General on Darfur, U.N. Doc. S/2006/591, para. 4 (28 July 2006).

132. *Id.*

133. U.N. Security Council, Report of the Secretary-General on Darfur, U.N. Doc. S/2007/462 (27 July 2007).

134. *Id.* paras. 2-24.

135. *Id.* paras. 2-23.

136. *Supra* note 38.

137. *Supra* notes 38-41.

meeting in June 2007.[138] In its report to the next Council meeting in September 2007, the Experts Group concluded that the Sudan government had only partially implemented its prior recommendations.[139]

Let me mention other notable developments related to the Darfur situation. Efforts to press universities' retirement and pension funds and states to divest from companies doing business in Sudan or with the government of Sudan have been ongoing since 2004.[140] The United States further strengthened the sanctions regime[141] it had earlier imposed against Sudan.[142] Several NGOs are actively promoting the wider acceptance and operationalization of the Responsibility to Protect principle and its application to the Darfur crisis.[143] In February 2007 the prosecutor requested the International Criminal Court to summon before the Court a Sudanese government official (Minister of State for the Interior) and a Janjaweed officer, charging them with crimes against humanity.[144] Also, the International Court of Justice ruled in *Bosnia and Herzegovina v. Serbia and Montenegro*,[145] that the 1995 massacre of 8,000 Bosnian Muslim men and boys in Srebrenica was an act of genocide. In doing so, the Court established an important precedent: that a state in a position to prevent genocide must act to stop it. Under this rationale Sudan may be held responsible to halt the genocide in the Darfur region.[146]

On July 31, 2007, the Security Council adopted Resolution 1769,[147] reaffirming paragraphs 138 and 139 of the Summit Outcome Document on the Responsibility to Protect. It established a United Nations and African Union

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138. *Id. Supra* notes 45-47 and the accompanying text.

139. For the Report of the Panel of Experts, see Letter dated 10 September 2007 from the Panel of Experts on the Sudan addressed to the Chairman of the Security Council Committee established pursuant to resolution 1591 (2005) concerning the Sudan, U.N. Doc. S/2007/584, Annex, at 2. "The Panel has determined that the governments of Chad and the Sudan have failed to fully implement the . . provisions of resolutions 1591 (2005) and 1672 (2006)." *Id.* at 3. "The Government of the Sudan has abjectly failed to take the necessary steps to protect and fulfil the human rights of individuals in Darfur, notwithstanding the security and access constraints that the Government experiences in certain parts of Darfur." *Id.* at 5. *See* Human Rights Watch, UN: Rights Council Should Set Benchmarks for Sudan -- Darfur Experts' Report is Basis for Assessing Progress, Sept. 24, 2007, at 1, *available at* hrw.org/english/docs/2007/09/24/sudan16943_txt. In a briefing paper, *Ten Steps for Darfur: Indicators for Evaluating Progress in the HRC Group of Experts Process,* Human Rights Watch outlines actions drawn from the recommendations compiled by the Group of Experts to improve the human rights situation in Darfur, *available at* www.hrw.org/backgrounder/un/sudan0907/.

140. *See, e.g.,* Sam Graham-Felson, *Divestment and Sudan,* THE NATION, May 8, 2006.

141. Bush Implements Sanctions, *supra* note 130.

142. Darfur Peace and Accountability Act of 2006, *supra* note 131; Executive Order: Blocking Property of and Prohibiting Transactions with the Government of Sudan, Oct. 13, 2006, *available at* www.whitehouse.gov/news/releases/2006/10/print/20061013-14.

143. *See, e.g.,* Responsibility to Protect/Engaging Civil Society, www.responsibilitytoprotect.org, and Save Darfur, www.savedarfur.org.

144. International Criminal Court, ICC-02/05, *Situation in Darfur, Sudan,* 27 Feb. 2007, *available at* www.icc-cpi.int/cases/Darfur.

145. IC Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 I.C.J. General List No. 91 (Feb. 26 Feb).

146. *See* Ved Nanda, *Bosnia Ruling a Victory for International Law,* DENVER POST, Feb. 28, 2007, at B7.

147. S.C. Res. 1769, U.N. Doc. S/RES/1769 (July 31, 2007).

hybrid peacekeeping force consisting of 19,555 military personnel and more than 6,000 police.[148] Thus, it is to augment the 7,000 African Union peacekeepers already in Darfur, which are underfinanced and poorly equipped, thus unable to provide protection to the people in Darfur.

Acting under Chapter VII of the U.N. Charter the Security Council authorized this hybrid peacekeeping force in Darfur "to take the necessary action" in order to protect their personnel and aid workers' freedom of movement, to prevent the disruption of the Darfur Peace Agreement and to protect civilians.[149] However, because of the lack of consensus among the Permanent Members, especially the opposition of China, the force is not authorized to disarm the Janjaweed militia or to seize illegal weapons.[150] Nor did the resolution contain a threat of sanctions against the government of Sudan if it failed to cooperate as it has done on numerous occasions in the past.[151]

Subsequently, in September 2007 U.N. Secretary-General Ban Ki Moon visited Sudan, Chad, and Libya. He announced that peace negotiations between the Sudanese government and the Darfur rebels would begin in Libya on October 27 under the auspices of the U.N.-A.U. envoys to Darfur, Jan Eliasson and Salim Ahmed.[152] However, the peace talks faltered, as several rebel groups boycotted them.[153]

The grave situation in Darfur continues. In a statement issued on January 11, 2008, on behalf of the U.N. Security Council on January 11, 2008, the President of the Council condemned "in the strongest possible terms the January 7 attack by elements of the Sudanese Armed Forces, as confirmed by the United Nations African Union Mission in Darfur (UNAMID) on a UNAMID supply convoy."[154] He added: "The Council expresses concern about the deterioration of security and humanitarian conditions in Darfur and calls upon the UN and all member states to facilitate the rapid and complete deployment of UNAMID."[155]

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148. *Id.* para. 2.

149. *Id.* para. 15.

150. In *id.* para. 9, the authorization is simply to "monitor" arms.

151. *But see* Gordon Brown, Prime Minister of Britain, and Nicolas Sarkozy, President of France, *We are Pushing and Pushing to Save the Darfuris,* THE TIMES (London), Aug. 31, 2007 at 19 ("If progress is not made on security, the ceasefire, political process and humanitarian access, we will work together for further sanctions against those who fail to fulfill their commitments, obstruct the political process or continue to violate the ceasefire." They further added, "It is the combination of a ceasefire, a peacekeeping force, economic reconstruction and the threat of sanctions that can bring a political solution to the region -- and we will spare no efforts in making this happen.)

152. Ban Ki-Moon, *What I Saw in Darfur; Untangling the Knots of a Complex Crisis,* WASHINGTON POST, Sept. 14, 2007, at A13.

153. *See, e.g.* Barney Jopson, *Darfur Rebels' Disunity Leads Only to Disarray,* FINANCIAL TIMES (London), October 31, 2007, at 8: "Boycotts threatened to scuttle the process before it had begun but it is clear that, even if all the rebels had come, their disparate diagnoses of Darfur's problems would make it hard to find common demands to put to Sudan's government."

154. Statement by the President of the Security Council, U.N. Doc. S/PRST/2008/1 (January 11, 2008).

155. *Id.*

Jan Eliasson, U.N. Special Envoy for Darfur, told the Security Council in an open meeting on February 8, 2008: "Over the last few months, the security and humanitarian situation in Darfur and the region has dramatically deteriorated, most recently through events related to Chad."[156] At the same meeting, the UNAMID Force Commander "voiced his strong concern over reported Government attacks against villages... in Western Darfur, with initial information indicating that many houses have been burned and lives lost. There have also been reports of aerial bombings in Silea village."[157] UNAMID is the hybrid United Nations and African Union peacekeeping operation, which formally took over peacekeeping responsibilities from the AU mission in the Sudan on December 31, 2007.[158] On February 9, 2008, UNAMID and the Sudanese government signed the Status of Forces Agreement, which provides the legal framework to allow the peacekeepers to operate.[159]

VI.

Clearly the government of Sudan is "unwilling or unable" to provide protection to people in Darfur who have continued to suffer brutal repression for four years. Under the Responsibility to Protect principle, in such a case the international community should assume that responsibility, which it has not yet done. What is obviously absent in implementing the principle is not only operational capacity but even more important, political will and commitment.[160]

Until the Security Council establishes guidelines on whether the threshold is met and on whether the use of military force is warranted, questions will continue to be raised as they have been with respect to Darfur. The task awaiting the Security Council remains that of translating the concept into a practical and enforceable tool.

Let me conclude by reiterating that a dramatic, indeed revolutionary, change has taken place with the international community's focusing sharper attention on international human rights issues around the world. We can be rightfully proud of this historic achievement in creating the essential norms, as well as the implementation machinery. What is still sorely lacking is the implementation and enforcement of those norms by states as the major actors that matter. That remains the unfinished agenda.

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156. U.N. News Service, *Darfur: Ongoing Violence Thwarting Peace Prospects, Say Top UN Officials*, *available at* www.un.org/apps/news/printnews.asp?nid=25562. The Darfur crisis has adversely affected the region. Tens of thousands of refugees from Darfur have sought protection in Chad. In early February, an attack by Chadian rebels, armed by Sudan, on the capital of Ndjamena, was repulsed. *See Chad -- A Regime Saved, for the Moment*, ECONOMIST, February 9, 2008, at 53; Lydia Polgreen, *Chad Capital Under Curfew Days After Coup Effort Failed*, N.Y. TIMES, February 8, 2008, at A6.

157. *Id.*

158. Statement by President of the Security Council, *supra* note 154.

159. U.N. News Service, *Secretary-General Speaks Out Against Recent Attacks in West Darfur*, *available at* http://www.un.org/apps/news/story.asp?NewsID=25564&Cr=darfur&Cr1=#.

160. *See* Gareth Evans, Responsibility to Protect, *supra* note 114, at 716-21 (identifying a number of problems with the concept's practical application).

INTERNATIONAL LAW FROM THE TRIAL JUDGE'S VANTAGE POINT

JUDGE JOHN KANE*

When I was appointed to the bench twenty-eight years ago, the vast area of international law was primarily a matter of intellectual curiosity for federal district judges. We looked at comparative legal systems with an eye toward making our own work a little less burdensome and confusing. The trial judge is essentially a pragmatist controlled by the discipline of rules and dominated by the ideologies of others in the form of binding authority. Until recently, we were not called upon to examine the judgments and decisions of other nations.

International law today, however, is rapidly emerging in ways that affect a court's daily tasks. This emergence is coincident to globalization and a judge's intellectual curiosity has shifted to pragmatic necessity. The importance of globalization is obvious: twenty-five percent of the U.S. gross domestic product is internationally derived.[1] For example, there is no longer such a thing as an American car; its parts, design and various manufactures come from throughout the world.[2] Another example: guess, for a moment, the number of countries in which the clothes you are now wearing have their origins and assemblies.

We operate today under a growing number of international conventions, treaties and protocols. Moreover, globalization comprehends increased awareness of and access to cultures and places far different from our own. The reach of multi-national corporations, the speed of world-wide communications and the growth of English as a universal language have given international law an importance in the federal trial courts that could not even be imagined a quarter of a century ago.

Until 1992, the district court of Colorado had cumbersome procedures for admitting lawyers from other parts of the United States to appear as counsel.

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*Judge John Kane is a United States Senior District Judge in the District of Colorado and a graduate of the University of Denver College of Law. The author wishes to acknowledge Professor Ved Nanda for inviting him to present this paper at the Sutton Colloquium and thus provoking these thoughts about an important topic.

1. Flerida Ruth P.Romero, *Lecture: Legal Challenges of Globalization, Delivered as Part of the Indiana Supreme Court Lecture Series at Indiana University School of Law – Indianapolis*, 15 IND. INT'L & COMP. L. REV. 501, 503 (2005).

2. *See, e.g.*, Kenneth F. Dunham, *International Arbitration Is Not Your Father's Oldsmobile*, 2005 J. DISP. RESOL. 323, 324 (2005).

Admission was couched in the antiquated phrase *pro hac vice* and required the persistent presence of a Colorado lawyer as local counsel.[3] Today, the price of admission is $160 plus a statement listing the various courts to which the applicant has been admitted.[4] At least half of the lawyers appearing before me come from other parts of the United States. More to the point, I have given the temporary right of audience to lawyers from England, India, Hong Kong and Canada. With increasing regularity I receive written submissions from lawyers in Europe, Asia, Australia and South America. Depositions in cases tried in my court take place with local authorization in Japan, South Africa, Indonesia and elsewhere. It would require an entirely separate speech to address the international aspects of patent and other intellectual property cases that form a major part of my docket today. (For the first ten years I was on the bench, I never had a patent case assigned to me.)

The fact is that international law and foreign law are being raised in our federal courts more often and in more areas than our courts have the knowledge and experience to handle. As Justice Sandra Day O'Connor observed, "There is a great need for expanded knowledge in [this] field, and the need is now."[5]

With the foregoing in mind, I will describe the approach that I take in developing this needed knowledge and skill as a trial judge. I will not be able to resist also opining on some of the problems we face as judges because of the xenophobia and obduration of some appellate judges and politicians. Undoubtedly I will talk about what most of you already know, but my viewpoint as a trial judge may assist you in understanding the need to educate judges in the area of international law, as Justice O'Connor suggested.

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International law in U.S. courts is considered a branch of our law in much the same way that torts, contracts or securities law are part of our system. We use it when the facts of the case demand it. The question of whether an individual invoking international law has rights or obligations on the international plane is essentially irrelevant. What is relevant is whether this or that international law, as a matter of American law, is appropriate to the resolution of the controversy before the court. The source of the rights and obligations at bar may be international law, but the determinations will be made in the same way and to the same extent that the source would be domestic legal rights and obligations.

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3. *See* D.C. COLO. L. CIV. R. 301 (repealed 1992).

4. *See* D.C. COLO. L. CIV. R. 83.3 and D.C. COLO. L. CT. R. 57.5; *see also* Application for Admission to the Bar of the Court in the United States District Court for the District of Colorado (2005), http://www.co.uscourts.gov/forms/bar_app_new.pdf (requiring applicants to list all jurisdictions in which they are admitted to practice and submit a check to the Clerk of the Court in the amount of $160.00).

5. Sandra Day O'Connor, Justice, United States Supreme Court, Keynote Address at the American Society of International Law Proceedings of the Ninety-Sixth Annual Meeting 351 (Mar. 16, 2002), *available at* http://www.humanrightsfirst.org/us_law/inthecourts/ASIL_Keynote_Add_2002_Just_O'Connor.pdf.

In a very real sense, it is not the international legal system that operates in U.S. courts but rather principles of international law that a judge determines are appropriate in the particular case. This role of international law in U.S. courts was addressed by the Supreme Court in 1900 in the landmark case of *The Paquete Habana*.[6] While one can never feel secure in the stability of precedent as cases are decided, and this particular case seems to be awaiting the judicial hangman, *The Paquete Habana* remains controlling authority. In the opinion, the Court noted that President William McKinley had ordered a naval blockade of the Cuban coast during the Spanish-American War "in pursuance of the laws of the United States, and the law of nations applicable in such cases."[7] The blockade commander captured two fishing vessels that were sold as prize of war.[8] The original owners sued to recover the proceeds of the sales.[9] The Supreme Court, sitting in admiralty as the prize court, held that international law prohibited seizing coastal fishing vessels during time of war.[10]

The Court wrote:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.... [11]

The meaning of this broad language has been the subject of academic controversy, but for a trial judge the message is clear. I am instructed that a treaty, executive act, legislation or authoritative judicial decision trumps customary international law. If there is no trump, then the customary international law card is played. The commentators, however, are more subtle. One view is that the first sentence, which quoted that "International law is part of our law" etc., means that international law is automatically and directly applicable in U.S. courts whenever relevant issues are up for decision. According to this analysis, customary international law is one of the laws of the United States comprising "the supreme law of the land" under Article VI of the Constitution that must be faithfully executed by the President under Article II, Sec. 3.[12] Under this view, courts have no independent role in their interpretation or application. Other commentators emphasize the second sentence regarding the trump cards and point out that President McKinley limited the application of customary international law in his executive order. Acts in violation of the executive order were therefore *ultra vires* and perforce void. Under this view, international customary law is treated as any other law under the common law method. Thus, the conclusions of U.S. courts are

6. The Paquete Habana, 175 U.S. 677 (1900).
7. *Id.* at 712.
8. *Id.* at 679.
9. *Id.*
10. *Id.* at 708.
11. *Id.* at 700.
12. U.S. CONST. art. VI, cl. 2; U.S. CONST. art. II, § 3.

influenced by prior international decisions or practice of the community of nations, but not compelled by them.

Perhaps more to the point of this address, the Restatement (Third) on the Foreign Relations Law of the United States rejects the view that newly developed customary international law could supersede a prior federal statute.[13] Unless, however, it is clear that Congress intended a different result, U.S. courts will attempt to interpret federal statutes to conform to customary international law, obligations and conventions. The courts will give special consideration and deference to views of the executive branch when called upon to interpret customary international law, and those rules or principles whose existence is disputed by the executive branch will normally not be given effect.

I also think it safe to say that in this area of developing jurisprudence for the federal courts, as in most other instances, considerable weight is given to the Restatement. When confronted with a question of international law, a federal trial judge is most likely to ask counsel, "What does the Restatement say?"

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Having described the basic outline of the trial judge's approach, I want to turn to what is for me, and I hope for you, a more interesting aspect: the revolution in the subject of international law in the U.S. courts. It is the recognition of individuals as capable of both exercising international rights and being compelled to respect international obligations. What was once the exclusive province of nation-states, national interests and sovereignty has been transformed into a dynamic and volatile subject of modern litigation. Individuals are no longer passive objects of international legal actions.

In this new development, a very old and unused law has been revived: I speak of the Alien Tort Statute that was passed by Congress in 1789 and hardly used at all until recently. This statute incorporates into U.S. law the law of nations for a specific purpose. The Alien Tort Statute gives federal courts original jurisdiction over civil actions "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[14] This statute was intended to assist the newly formed United States government in taking its place among the civilized nations of the world, primarily to obtain something more than mere sufferance from the nations of Europe.

The statute was designed to avoid international conflict by providing an objective forum in which aliens could seek redress for injuries inflicted by American citizens, either in the United States or abroad, when those injuries were such as to implicate the honor or protective duty of the injured alien's country. The statute is solely a grant of jurisdiction and does not require a particular result in any case.

13. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 (1987).

14. 28 U.S.C. § 1350 (2007).

In *Filartiga v. Pena-Irala*, a 1980 decision of the Second Circuit, the court found jurisdiction under the Alien Tort Statute over a claim by an alien against an official of his own government for the torture-slaying of the plaintiff's son.[15] The court found that torture conducted under color of law was a violation of the law of nations and that the international law of human rights did not distinguish between violations directed at one's own subjects and violations directed at others.[16] Faced with a possible flood of cases brought by aliens against their own governments asserting violations of international human rights law, the federal courts have moved to limit *Filartiga's* principles both on political question and lack of available remedy grounds.[17]

However, jurisdiction under the Alien Tort Statute does not lie against a foreign state. Jurisdiction in such cases is found only if the cause of action falls within one of the exceptions to immunity enumerated in the Foreign Sovereign Immunities Act. In general terms the exception to sovereign immunity does not apply to discretionary acts; the Supreme Court has held that the exception is limited by its terms to damages occurring in the United States.[18]U.S. embassies are not within this exception.[19]

As one commentator has stated about the Alien Tort Statute:

> [O]ver the last quarter-century, starting with *Filartiga v. Pena-Irala*, the venerable statute has been deployed as the basis for a thriving body of human rights jurisprudence, permitting U.S. judges to give effect within their courtrooms to some of the most fundamental commitments made by nations to one another in the years following World War II.[20]

This brings us to a discussion of some U.S. Supreme Court cases that, among other things, have prompted legislation which at first blush is amusingly stupid, but on reflection is dangerous both to the concept of international law and to the place of the United States in the community of nations.

The first case is the 1992 decision in *United States v. Alvarez-Machain* that has been condemned even by nations friendly to the United States and described by Justice Stevens as "monstrous."[21] The Court held that the conduct of an agency of the United States, the Drug Enforcement Administration [DEA], in kidnapping a foreign national while in his own country and transporting him to the United States against his will despite the existence of a fully functioning extradition treaty, did not affect the jurisdiction of the U.S. District Court over his person.[22] The Court

15. Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).

16. *Id.*

17. *See, e.g.*, Sarei v. Rio Tinto, PLC, 456 F.3d 1069, 1117-20 (9th Cir. 2006).

18. Sosa v. Alvarez-Machain, 542 U.S. 692, 715 (2004) (listing the exceptions of violation of safe conduct, infringement of the rights of ambassadors, and piracy).

19. *See id.*

20. Steven M. Schneebaum, *The Paquete Habana Sails On: International Law in U.S. Courts After* Sosa, 19 EMORY INT'L L. REV. 81, 82 (2005).

21. U.S. v. Alvarez-Machain, 504 U.S. 655, 687 (Stevens, J. dissenting).

22. *See id.* at 668-70.

held in effect that treaties do not confer rights on individuals unless they are expressly so described in the advice and consent to their ratification.[23] Alvarez was tried for his alleged role in the brutal murder of DEA Agent Enrique Camarena.[24] The judge directed a verdict of acquittal at the conclusion of the prosecution's case.[25] It was a good result for the plaintiff, but a sorry one for the law of nations.

Dr. Alvarez-Machain then sued DEA Agent Sosa and the other individual kidnappers.[26] The burden on Dr. Alvarez-Machain as plaintiff was not to prove that the Alien Tort Statute created a private cause of action, but that the facts alleged in the complaint described a violation of international law. For reasons that do not bear scrutiny, the Court found that Dr. Alvarez-Machain failed to establish that there was a firm international consensus on an enforceable right to be free from temporary restraint by law enforcement officers acting extraterritorially.[27]

It is not, however, the result that has spurred opposition, but rather the Court's announced premise that international human rights are the legally enforceable rights of individuals and that the conduct of individuals may be found to be actionable violations of those rights. The Bush Administration had called upon the Court to reject those propositions that carry with them the tradition dating back to Chief Justice Marshall that international law is part of our law, with its interpretation consigned to the judicial branch.[28]

In this sense, there is a *Marbury v. Madison* flavor to Justice Souter's opinion. Marbury did not get his appointment as a justice of the peace, but the doctrine of judicial review of the political branches' actions in determining the law was firmly established. In *Sosa*, Dr. Alvarez-Machain did not recover for the wrongs done to him, but the principle of international law being part of U.S. law was emphatically stated.

The third case is the Supreme Court's 2005 decision in *Roper v. Simmons*, holding that executing an offender for crimes committed before he was eighteen years old would be cruel and unusual punishment.[29] Justice Kennedy's majority opinion cites international instruments and other nations' practices to demonstrate evolving standards and attitudes against capital punishment of youthful offenders.[30] Justice Scalia's dissent attacks the majority's reliance upon international treaties and foreign practices.[31] Justice O'Connor filed a separate

23. *Id.* at 667-69.

24. *Id.* at 655; U.S Drug Enforcement Administration, Biography of Agent Enrique Camarena, http://www.dea.gov/agency/10bios.htm (last visited Feb. 19, 2007).

25. Alvarez-Machain, 504 U.S. at 655-56.

26. Alvarez-Machain v. U.S., 107 F.3d 696, 698 (9th Cir. 1996).

27. Sosa, 542 U.S. at 713.

28. David R. Mapel, *Fairness, Political Obligation, and Benefits Across Borders*, 37 POLITY 426, 437 n.25 (2005).

29. Roper v. Simmons, 543 U.S. 551, 551 (2005).

30. *Id.* at 575-76.

31. *Id.* at 622-28 (Scalia, J., dissenting).

dissent finding insufficient evidence of a national consensus on the issue, but endorsing the relevance of international practice to Eighth Amendment analysis.[32]

Justice O'Connor's comments merit emphasis. She said:

> Obviously, American law is distinctive in many respects.... [b]ut this Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement — expressed in international law or in the domestic laws of individual countries— that a particular form of punishment is inconsistent with fundamental human rights.[33]

Interestingly enough, in the 2004 decision *Olympic Airways v. Husain*, Justice Scalia, joined by Justice O'Connor, dissented from the majority opinion for its failure to address how the courts of U.S. treaty partners addressed the issue of what constitutes a factual event under the Warsaw Convention.[34] Justice Scalia's dissents must be studied carefully to discern when and under what circumstances he thinks international law is relevant to American judicial enquiry. That, however, is not my assigned topic. Suffice for the moment to say that Justice Scalia asserts that foreign law should have no bearing on the proper interpretation of the U.S. Constitution and judges interpreting our Constitution should pay no heed whatsoever to how other countries interpret their own constitutions.[35]

Two other decisions merit reference in this regard. The 2002 case of *Atkins v. Virginia* held that the cruel and unusual punishments prohibition of the Eighth Amendment forbids the execution of mentally retarded defendants.[36] The Court determined that "the evolving standards of decency" that mark the progress of a maturing society placed the execution of the mentally retarded beyond the pale.[37] In so ruling, the Court took account of practice in American states, but also referred favorably to a brief filed by the European Union that catalogued the overwhelming repudiation of the practice by the rest of the world.[38]

In 2003, the Supreme Court decided *Lawrence v. Texas* and invalidated a state law criminalizing homosexual sodomy.[39] The Court's opinion focused on U.S. sources, but Justice Kennedy's majority opinion also cited a 1967 Act of the English Parliament and a 1981 ruling of the European Court of Human Rights invalidating similar criminal prohibitions.[40] Justice Kennedy alluded to these

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32. *See id. at* 604 (O'Connor, J., dissenting).

33. *Id.* at 605.

34. Olympic Airways v. Husain, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting).

35. *Id.*

36. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

37. *Id.*

38. *Id.* at 316 n.21; *see also* Brief for The European Union as Amicus Curiae Supporting Petitioner at 4-10, McCarver v. N.C., 533 U.S. 975 (2001) (No. 00-8727).

39. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

40. *Id.* at 572-73; *see also id.* at 604 (Scalia, J., dissenting) (citing Canadian case law with

foreign laws to rebut the claim of the supporters of the Texas law that criminal prohibition of homosexual sodomy was universally accepted within Western civilization.

All of these cases, and particularly the last two, prompted a U.S. congressman and a U.S. senator to introduce a bill called the "Constitution Restoration Act" that, among other things, would make it an impeachable offense for a federal judge to base a decision on foreign law. Section 201 of the Act states:

> In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than the constitutional law and English common law.[41]

Aside from its grammatical incompetencies, the proposed Act does not define what it means by "constitutional law" and "English common law." A plain reading suggests that a judge could be impeached for relying on the Ten Commandments. Pretty clearly, John Locke, Montesquieu, Edmund Burke, and Rousseau would be suspect, and I could be impeached for citing Plato's Republic. Aside from all else, it would make determining the intent of the Framers a more onerous task.

As for the English common law, one would need to tread softly. Most American states include within their constitutions or statutes a provision that the common law of England that can be considered of full force stops as of March 24, 1607: the day the first ship sailed from England to what would become the lost colony of Jamestown, Virginia. I would dare not cite the Statute of Frauds which was enacted by the British Parliament in 1677. A host of other precedents, such as the McNaghten Case, would be swept away from the American lexicon. I think the point is made that this proposed statute is utterly stupid. In the unlikely event that Congress would enact the Constitution Restoration Act, it would not be enforceable and the first court to review it would likely strike it down without having to rely on any foreign law.

I said earlier, however, that further reflection suggests to me that beyond the xenophobic blindness of this proposed legislation, a more insidious danger lurks. We cannot afford to ignore outrageous demonstrations of ignorance such as the canard that the Holocaust never happened, nor the instant one which presumes that the fundamental law of the United States can be understood without reference to the history of western civilization.

On a more practical basis, the attack on the use of international law receives aid and comfort from significantly influential elements of the business community. It is not directly related to the Guantanamo cases, nor for that matter to the brutal murder of DEA agent Camarena described in the *Sosa* decision. The gravamen is

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disapproval as an example of "judicial imposition of homosexual marriage").

41. Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. § 201 (2004); Constitution Restoration Act of 2005, S. 520, 109th Cong. § 201 (2005).

that human rights activists have begun to use the Alien Tort Statute in suits against businesses, including UNOCAL and others, for allegedly participating in systemic human rights abuses in cooperative ventures with Third World governments.[42]

The threat of subjecting overseas activities of American businesses to judicial review is ominous. As the United States government increases its use of American businesses and their subsidiaries to enforce and enlarge the new American imperium, the idea of being sued in American courts for reprehensible acts is not an unrealistic proposition. Why, one must speculate, would the U.S. Department of Justice argue for the most restricted judicial interpretation of the Alien Tort Statute? One has only to suggest the different consequences of class actions and individual tort claims to come up with a plausible explanation.

From a trial judge's perspective, the class action looms large. Indeed, only a few mega-verdicts would be enough to change much of the overseas conduct of American businesses.

It is obvious that our world is becoming increasingly interdependent. The age of nationalism is not over, but it will change or perish. There is much to learn from every system of law and government and if we fail to take advantage of these experiences and wisdom, we do so at our peril. It is neither desirable nor possible that this country we love so much can go it alone or sustain the status of a superpower without embracing the concept and the reality of mutual global concern. What a wonderful reality it would be for this country to be loved for what we do and revered for the justice we provide.

42. *See, e.g.*, Nat'l Coal. Gov't of the Union of Burma v. UNOCAL, Inc., 176 F.R.D. 329, 334 (C.D. Cal. 1997), *rev'd on other grounds*, 70 F. Supp. 2d 1073, 1082 (C.D. Cal. 1999); Doe I v. UNOCAL Corp., 395 F.3d 932, 936 (9th Cir. 2002).

THE MULTI-STATE RESPONSIBILITY FOR EXTRATERRITORIAL VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS*

TODD HOWLAND**

"At some point in the development of every legal system, the original strict and formal application of rules is supplemented by a freer approach which aims to go beyond the positivist strictures."[1]

I. INTRODUCTION

This article argues for a change of perspective in the enterprise of promoting and protecting human rights. Long the province of the relationship of individual citizens to their state, this article goes beyond the present trends related to human rights obligations of non-state actors and its extraterritorial application. This article posits that multiple states can and do hold legal responsibility to protect and promote the human rights of the same individual.

The idea that multiple states have human rights obligations to the same individual is derived, in part, from the author's own experience working in "failed states" and as part of multilateral efforts to bring peace, respect for human rights, and stability to war-torn and dysfunctional countries. Often the resources (e.g., power and financial capacity) at the disposal of the "host state" were extremely limited, while the United Nations Member States choosing to intervene in that country, either bilaterally and/or multilaterally, had extensive resources and at times more political power than the host country.

Oddly, considering legal developments in other fields and the nature of human rights, there is a continuing practice of placing all legal obligations for violations of human rights on the country where such violations occur. Those

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1. Martin Josef Schermaier, *Bona fides in Roman Contract Law*, *in* GOOD FAITH IN EUROPEAN CONTRACT LAW 63 (Reinhard Zimmermann and Simon Whittaker eds., 2000) at 63.

states that have voluntarily joined in efforts to rehabilitate failed states have enjoyed total impunity. This impunity is enjoyed regardless of the relative power and financial capacity brought to bear in what these states would call a collective endeavor to bring peace, the respect for human rights and stability to war torn and dysfunctional countries.[2]

Most relevant to development of the theory presented in this article is the author's recent work related to Haiti. Thus, the article begins with contextual information about Haiti. It continues with a discussion of theoretical considerations regarding the multi-state responsibility for extraterritorial violations of economic and social rights. This discussion first addresses historic humanitarian purposes, intervention industry reality,[3] the essence of human rights law, the legal concept that sovereignty is not jurisdiction, the criminal and civil nature of human rights law, and voluntarily assumed legal obligations. These theoretical considerations will then ground a discussion of specific hurdles to achieving multi-state responsibility for extraterritorial violations of economic and social rights, including marginalization of economic and social rights, exterritorial application of human rights law and multi-state responsibility. The article will conclude with a policy suggestion.

II. HOW RECENT EXPERIENCE IN HAITI INFORMS THE ARGUMENT

Every year, the Robert F. Kennedy Memorial bestows its Human Rights Award on a creative and courageous activist.[4] During the period when the author directed the Memorial's Center for Human Rights, the Center committed to working for many years with the recipient to help her or him achieve specific

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2. In fact, the United Nations was founded for this reason. *See, e.g.*, U.N. Charter pmbl. *We the Peoples of the United Nations Determined* to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, *And for these Ends* to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security, and to ensure by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples, *Have Resolved to Combine our Efforts to Accomplish these Aims* Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

3. Considering the cost and frequency of military, peacekeeping, humanitarian and development interventions, they have become an industry.

4. Robert F. Kennedy Memorial, http://www.rfkmemorial.org/legacyinaction/humanrightsawardadvocacy/ (last visited April 20, 2007).

human rights changes. In 2002, Loune Viaud, a right to health activist from Haiti, won the award.

After the ouster of President Aristide in February 2004[5] Viaud was skeptical about the new transitional government,[6] although she was hopeful that this international intervention, the 5th UN peacekeeping operation to Haiti,[7] would become more engaged in and supportive of development in Haiti than past missions. She was skeptical about the change because her organization had developed a number of projects implemented with the Aristide government that were measurably improving access to health care and had a positive impact on the AIDS crisis in the country. In fact, this was one of the reasons why she won the award. After Aristide's ouster, however, programs such as these, run jointly with the new government, were negatively impacted.

Haiti was considered a "failed state" and had a temporary or interim administration that was established extra-constitutionally with a good deal of support, cajoling, arm-twisting, and imposition by important states such as the United States. Much against the council of experience and of experts, the US militarily intervened to facilitate Aristide's removal and the "restoration" of order when regional actors were against the idea and most favored preventive measures.[8] The US obtained UN Security Council support for the US led "multinational interim force" intervention and quickly turned the intervention over to the UN.[9] The Member States voluntarily intervening in Haiti, acting bilaterally and collectively, were better resourced and arguably may have exerted more influence over the country's direction than those nominally running the transitional government. But what is key here is that power and resources were brought to bear by various Member States to achieve a common objective: to bring peace, respect for human rights and stability. They brought resources that were much greater than those of the Government of Haiti.[10]

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5. President Aristide had been deposed once before. In fact, Haiti never had a democratic transition until 1994, when President Aristide handed power over to Rene Preval, who won the Presidential vote. Aristide was barred from running for a second consecutive term, but was elected again in 2001 in the context of growing instability. *See, e.g.,* Paul Farmer, *Haiti's Wretched of the Earth*, TIKKUN MAGAZINE, May–June 2004; Walt Bogdanich & Jenny Nordberg, *Democracy Undone – Mixed U.S. Signals Help Tilt Haiti to Chaos*, N.Y. TIMES, Jan. 29, 2006, at A1.

6. The Transitional Government was a disappointment from a traditional human rights perspective as well. *See, e.g.,* Amnesty Int'l, *Amnesty International Report 2005:The State of the World's Human Rights, Haiti section*, AI index POL 10/001/2005, May 25, 2005, *available at* http://web.amnesty.org/report2005/hti-summary-eng.

7. *See* S.C. Res. 1542, U.N. Doc. S/RES/1542 (April 30, 2004); *See generally,* United Nations Stabilization Mission in Haiti, http://www.un.org/depts/dpko/missions/minustah/index.html (last visited April 23, 2007).

8. US interventions in failed states have basically been failures and should be used rarely as opposed to as a tool invoked without trying many alternatives. *See, e.g.,* Anatol Lieven, *Failing States and US Policy*, Sept. 2006, Stanley Found. Pol'y Brief. *available at* http://www.stanleyfoundation.org/publications/pab/pab06failingstates.pdf.

9. S.C. Res. 1529, U.N. Doc. S/RES/1529 (Feb. 29, 2004).

10. Todd Howland, *Peacekeeping and Conformity with Human Rights Law – How MINUSTAH Falls Short in Haiti*, 13 INT'L PEACEKEEPING 462, 470 (2006).

Haiti is not the exception. The author has seen the problem first hand while working with the UN in post-genocide Rwanda, where those participating in the international intervention were much better resourced than the post-genocide government. When the author arrived in Rwanda, the Ministry of Justice, tasked with responding to the genocide, had almost no resources. Most of the infrastructure of the Ministry had been destroyed. The only vehicle the Ministry had was the Minister's old worn out private car, which on most days needed to be push started. Situations vary in terms of relative resource capacity and political power, but every country in crisis with an international intervention shares some of the same characteristics. In the absence of a war, a ceasefire, a peace process, or a peace accord, the UN Stabilization Mission to Haiti (MINUSTAH)[11] was an especially clear example of a relatively well-resourced peacekeeping mission sent to a country with extreme poverty and a long history of bad governance.

A few months after the UN established a peacekeeping operation in Haiti, Loune Viaud would call the author and complain that "the UN was in Haiti on vacation" or that the donors say they have pledged over a billion dollars, but that she saw no visible impact from this money and questioned if any had actually been disbursed.[12] Given she runs one of the largest NGOs in Haiti, if she and her staff are unaware of the positive impact there probably was none. Viaud became more and more outraged at the fact that the UN had taken over Haiti's only medical school for its troops. The UN troops had electricity, running water and transport, but Haitian communities did not. She would call and complain that kids were lining up outside the UN compound to read because it was one of the few places in town with good light at night. Research done at that time by the RFK Memorial Center for Human Rights demonstrated an enormous gap between significant

11. On April 30, 2004, the UN Security Council decided to establish the United Nations Stabilization Mission in Haiti (MINUSTAH) and requested that authority be transferred from the Multinational Interim Force (MIF), authorized by the Security Council on February 29, 2004, to MINUSTAH on June 1, 2004. *See* S.C. Res. 1542, *supra* note 7; S.C. Res. 1529, *supra* note 9.

12. Ms. Viaud's concern about lack of disbursement of promised funds was confirmed by research conducted by the RFK Memorial Center for Human Rights in 2005 and early 2006. Much of the money promised in the donor conferences had not been operationalized. *See* Interim Cooperation Framework, Summary (April 2006) (unpublished study, on file with the Denver Journal of International Law and Policy). The UN, through a recent high-level panel, has recognized that "the UN and its specialized agencies have much to offer in the way of expertise, knowledge, resources and practical experience . . . [b]ut the system is failing widely." They pointed to a lack of institutional effectiveness, cost efficiency and focus. Poor governance, unpredictable funding, and outdated practices, as well as an often fragmented and weak UN presence on the ground were also cited. The Panel blamed "policy incoherence, program duplication, and vested interests in the status quo," with attempts by UN staff to remedy the situation "thwarted by inappropriate administrative procedures, mediocre management and ill-conceived loyalties." Shaukat Aziz, Luisa Dias Diogo & Jens Stoltenberg, *Unifying the UN*, INT'L HERALD TRIB., Nov. 8, 2006, *available at* http://www.iht.com/articles/2006/11/08/opinion/edaziz.php; *See also* The Secretary-General's High-Level Panel, *Report of the Secretary-General's High-Level Panel on UN System-wide Coherence in the Areas of Development, Humanitarian Assistance, and the Environment: Delivering as One, delivered to the Secretary-General*, U.N. Doc A/61/583 (Nov. 9, 2006).

pledges, their disbursement, and their operationalization. This research supports Viaud's anecdotal account.[13]

There was no hot war in Haiti, so it was unclear why the main response of the UN Security Council was to send troops. Making change on the ground is no easy task,[14] but sending the wrong tool does not make it any easier.

MINUSTAH's annual budget was larger than that of the Government of Haiti. Larger. This is without considering other multilateral and bilateral support not already part of the annual governmental revenue or loan stream, or the amounts that come into Haiti which are not part of Government revenue. For example, the US in 2004 and 2005 disbursed $352 million in assistance for Haiti; most of it through US based NGOs.[15]

The Haitian government had annual revenues of about US$400 million and expenditures of about US$600 million in 2005,[16] whereas the approved 2005 MINUSTAH budget was US$518.30 million.[17]

Remarkably, an ally of former President Aristide, his former Prime Minister, was elected President a little more than two years following Aristide's ouster.[18] His election brought about a reduction in political violence, which could indicate that international intervention may have contributed to, as opposed to minimizing, the political violence.

Viaud's complaint can be boiled down to the following:

Has the international intervention, with all its expenditures, actually measurably improved the human rights situation in Haiti?

Her complaint begs the question: do those participating in the international intervention collectively (e.g., as the UN or World Bank) and/or as individual States actually have an obligation to spend monies allocated or design programs in a way to consciously maximize their positive impact on the human rights situation? This article sets out to demonstrate that the answer to this question is yes. At present there is a gulf between those scholars who convincingly assert that such

13. Interim Cooperation Framework, Summary (April 2006) (unpublished study, on file with the Denver Journal of International Law and Policy).

14. *See* DR. JAMAL BENOMAR, RULE OF LAW TECHNICAL ASSISTANCE IN HAITI: LESSONS LEARNED, A World Bank Conference: "Empowerment, Security and Opportunity through Law and Justice," St. Petersburg, Russia (July 8-12, 2001) *available at* http://haiticci.undg.org/uploads/Lessons%20Learned%20Justice_2001.pdf (discussing how to advance reform in a political environment not conducive to change and characterized by protracted political crisis and paralysis).

15. U.S. Dep't of State, *Background Note: Haiti*, Jan. 2007, http://www.state.gov/r/pa/ei/bgn/1982.htm (last visited May 14, 2007).

16. The CIA World Factbook, *Haiti*, https://www.cia.gov/cia/publications/factbook/geos/ha.html (last visited April 23, 2007).

17. The Secretary-General, *Report of the Secretary-General on the Revised Budget for the United Nations Stabilization Mission in Haiti for the Period from 1 July 2005 to 30 June 2006*, U.N. Doc. A/60/176 (Aug. 1, 2005).

18. Louis Aucoin, *Haiti's Constitutional Crisis*, 17 B.U. INT'L L.J. 115, 118 (1999).

human rights obligations exist[19] and operational entities that seem to even begrudge being bound by humanitarian law after a directive from the UN Secretary General.[20]

III. THEORETICAL CONSIDERATIONS

As odd as it may sound, political and bureaucratic concerns trump human rights obligations in the organization of international missions, mainly because Member States and multilateral and bi-lateral bureaucrats do not consider themselves bound by human rights law in the organization and operation of an intervention.

How human rights obligations can more effectively organize mission resources and hold accountable those involved in international interventions needs to be better defined. For a variety of reasons, the questions "Who holds human rights?" and "Who has the obligation to respect human rights?" are increasingly complex.

A. Humanitarian Purpose v. The Intervention Industry

Historically, linked to the work of the International Red Cross and the content of humanitarian law or the rules of war, interventions with a humanitarian purpose have developed a certain mystique. They enjoy international protection: not just limited scrutiny, but affirmative privileges.

The problem is that interventions with an ostensible humanitarian purpose now regularly include a full range of operations, from aid programs to sending troops (known informally as "blue helmets").[21] This complicates any effort to hold individual states responsible, since a state may easily avoid scrutiny by claiming a humanitarian purpose.[22]

In the International Court of Justice's consideration of the complaint by the Nicaraguan government regarding the covert war the US was waging against it, the ICJ even entertained the United States' argument that its activities in Nicaragua should be considered of humanitarian nature and, therefore, legitimate. The ICJ stated: "the provision of humanitarian aid cannot be regarded as an unlawful intervention or in any way contrary to international law... if [implemented] to avoid violations of sovereignty and limited to the purpose 'to prevent and alleviate

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19. MARGOT SALOMON & ARJUN SENGUPTA, *The Human Rights Obligations of Multilateral Institutions and of States as Members of the MLI, in* THE RIGHT TO DEVELOPMENT: OBLIGATIONS OF STATES AND THE RIGHTS OF MINORITIES AND INDIGENOUS PEOPLES 39-40 (2003), *available at* http://www.minorityrights.org/admin/Download/pdf/IP_RTD_SalomonSengupta.pdf (last visited Apr. 17, 2007).

20. The Secretary-General, *Observance by United Nations Forces of International Humanitarian Law*, UN Doc. ST/SGB/1999/13 (Aug. 6, 1999); *See, e.g.*, Ray Murphy, *An Assessment of UN Efforts to Address Sexual Misconduct by Peacekeeping Personnel*, 13 INT'L PEACEKEEPING 531, 532 (2006).

21. DAVID RIEFF, A BED FOR THE NIGHT: HUMANITARIANISM IN CRISIS 308, 328 (2002).

22. Adding to the complexity is that more and more state functions, such as delivering foreign aid, are being contracted to private entities (both for profit and non-profit). *See* Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law*, 47 WM & MARY L. REV. 135, 146-60 (2005).

human suffering' and 'to protect life and health' and to ensure respect for human beings and given without discrimination."[23]

Although the ICJ did not find the US intervention in Nicaragua to have a humanitarian purpose, its tautological statement that humanitarian aid cannot be regarded as contrary to international law is consistent with the mystique that has developed around humanitarian purpose. Humanitarian intention is now used instrumentally by governments and NGOs as a means to avoid seriously evaluating whether their intervention actually contributes to measurably improving the human rights situation. If the intervention can be classified as having a humanitarian purpose, intervening states can avoid scrutiny. The question should be not whether there is a humanitarian purpose, but whether interventions have a measurable impact on human rights.

Within many international NGOs, there has been a reaction and soul-searching whether good intentions are good enough.[24] There has not been a similar process for states and international organizations. Scholars of humanitarianism have discussed the need for human rights to be respected and promoted by NGOs.[25]

The reality that international interventions have become a major industry needs to be considered. The fact that public monies fuel this industry is not a reason to avoid scrutiny, but rather a reason for it. If one was to sum all the entities which contribute to work that may fall into the vaguely worded humanitarian purpose, the amount would be significant.[26]

The international intervention industry offers goods and services and should be treated like any other industry. Having good intentions should not free the industry from human rights obligations. The public policy behind holding those who manufacture goods or provide services responsible for their quality applies to all actors, including those with the ostensible intention to do good.

The fact that governments have long history of making laws and not applying those laws domestically simply highlights the historical challenge, but it does not negate the importance of forcing governments to accept their legal obligations.

B. The Essence of Human Rights Law

The preamble of the American Declaration of the Rights and Duties of Man asserts that "the essential rights of man are not derived from him being a national of a particular state, but are based upon attributes of his human personality."[27]

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23. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 242-243 (June 27).

24. *See generally* MARY B. ANDERSON, DO NO HARM: HOW AID CAN SUPPORT PEACE OR WAR (1999); Hugo Slim, *Doing the Right Thing: Relief Agencies, Moral Dilemmas and Moral Responsibility in Political Emergencies and War*, 21 DISASTERS 244, 244 (1997).

25. Hugo Slim, *Not Philanthropy But Rights: The Proper Politicisation of Humanitarian Philosophy in War*, 6 INT'L. J. HUM. RTS. 1, 8 (2002).

26. For example, all the foreign aid budgets, the budgets of international organizations (e.g. UN, WB), even some parts of defense budgets designated for this purpose, as well as NGOs and private foundations for this purpose.

27. O.A.S. Res. XXX, reprinted in Basic Documents Pertaining to Human Rights in the Inter-

States during the Vienna Conference declared, "Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments."[28] What is noteworthy in this language is that it reiterates attachment of rights to the individual and the use of the plural form of government, inferring that more than one government can be concerned with the rights of a particular individual.

But for years there has been theoretical debate and practical confusion about human rights. To some degree, growing out of the state-centric reality of international law, it is understandable how many attempted to limit human rights to being a matter between a citizen and his or her state of citizenship. Being about the individual without a link to a particular state seems fanciful, but if the objective of law is the protection of the individual and creation of a just world, that is the logical outcome.[29]

If entities with the capacity to effect positive changes in human rights are not bound by human rights principles, this reinforces the idea that human rights law has no restraining normative content and may be manipulated simply for political ends.[30] The more often human rights law is applied to those with the power to comply with those obligations, the closer we are to a place where the individual person, not states, forms the essence of the law.[31]

It has been a time-honored practice to ridicule the fact that human rights law and international law in general are violated and to question their validity based on this fact. For example, in *Candide* Voltaire mocks:

> He passed over heaps of dead and dying, and first reached a neighboring village; it was in cinders, it was an Abare village which the Bulgarians had burnt according to the laws of war.[32]

The fact that all laws are broken, however, does not mean there is no law—but it does affect the law's acceptance and effective enforcement. What is most problematic, however, is the relative difficulty of getting the most powerful entities actually to accept and comply with their human rights obligations. While lack of mechanisms, effective forums and third party oversight do not negate the existence of rights, it certainly makes our job as human rights advocates challenging.

American System, OAS/Ser.L/V/I.4 Rev. 9 (2003); 43 AJIL Supp. 133 (1949).

28. World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, I(1), U.N. Doc A/CONF.157/23 (July 12, 1993).

29. In many ways this is already a well established principle, for example, "Aliens shall enjoy, in accordance with domestic law and subject to the relevant international obligation of the State in which they are present . . . ." Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, G.A. Res. 40/144, Art.5, Annex, U.N. GAOR, Supp. No. 53, U.N. Doc. A/40/53 (Dec. 13 1985).

30. MARTTI KOSKENNIEMI, APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 251-54 (2005)

31. JANNE ELISABETH NIJMAN, THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW 457-73 (2004).

32. VOLTAIRE, CANDIDE (Boni & Liveright, Inc. 1918) (1759).

Western tradition related to rights seems grounded in a tight knit community or nation, where a contract between governed and governors defines these rights. This idea, in times of little movement between one nation and another, worked adequately enough to ground human rights law. But today, human rights law is about protecting individuals from those who have the capacity to respect or violate their rights.[33] The "community" is heterogeneous and international, and therefore laws ought to apply globally. Indeed, in 1993, the Vienna Conference affirmed the idea that human rights are universal, indivisible, interdependent and interrelated, yet we have not achieved full acceptance of human rights as a constant limitation of power.

> [T]he contracting states do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'etre of the convention... The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.[34]

Historically, human rights law has been viewed too narrowly and has been portrayed as a dichotomy based on intentions, good or evil. In fact, because human rights apply to everyone, not only people with evil intentions can violate them. Often organizations created to do good, such as the UN, NGOs and even human rights groups, can violate an individual's human rights. The idea that violators must be evil limits the understanding and application of human rights.[35]

C. Human Rights Law has Both Criminal and Civil Aspects

It is important to be reminded of the criminal and civil aspects of human rights law in order to highlight that it is very common in both these areas of law to have multiple actors held responsible for actions that took place in another country.

A human rights violation can constitute a violation of both criminal and civil law. In many legal systems cases based on one set of circumstances will include both civil (e.g. monetary damages against individuals, corporate or government entities) and criminal aspects (e.g. jail time for individuals, usually working in some official capacity). For example, in the United States, the same violation may trigger two different actions, one using the criminal justice system and the other civil. On the international level, the same violation may also be treated in two ways. Actions to regional bodies are similar to civil actions, given monetary damages and orders to change practice will be the frequent remedy. For certain

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33. *See, e.g.,* Alon Harel, *How (and Whether) to Rethink Human Rights*, 9 INT'L LEGAL THEORY 87, 88 (2003).

34. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 3, 23 (May 28).

35. David Kennedy, *The International Human Rights Movement: Part of the Problem?* 15 HARV. HUM. RTS. J. 101, 109, 111 (2002). One should question the effectiveness of international interventions and of the overriding usefulness of the dominant paradigm, given the world should be better off then we are. Review Essay Symposium: *Phillip Allott's Eunomia and Health of Nations - Thinking Another World: 'This Cannot Be How the World Was Meant to Be'* Discussion, 16 EUR. J. INT'L. L. 255, 256, 260 (2005).

enumerated human rights violations, an action can be brought to the International Criminal Court.

Jurisdiction in criminal law can be asserted where the crime occurred, based on nationality (of defendant or victim), universal jurisdiction (certain enumerated crimes, for example crimes against humanity) or by treaty.[36] In civil law, jurisdiction has been easier to obtain and is often asserted through minimum contacts that do not offend notions of fair play.[37]

Many theories regarding accountability of multiple actors have been developed and are in use throughout the world. Most of these theories allow for degrees of responsibility or fault, distinguishing the actions of one wrongdoer from another involved in the same action. Theories and practice, ranging from simple to very sophisticated, have developed to allocate or apportion fault, responsibility and liability, which include: co-defendant and co-conspirator liability, agency, contract, vicarious liability, respondeat superior, market share liability, joint and several liability, enterprise liability and comparative fault.[38]

D. Jurisdiction in Human Rights Law

Unfortunately, human rights and humanitarian law are often lumped together within the public international law field. Practitioners often practice both, and human rights lawyers are far from immune from the phobia that human rights law may be more fantasy than fact. Because humanitarian law is the more developed discipline, practitioners often wrongly borrow its obsession with a threshold jurisdictional hurdle, when no such hurdle need be crossed in human rights law. This desire to first determine if human rights law applies has created a problem for its extraterritorial application; such a hurdle should not have been created in the first place.

Human rights is distinct from most international law or law between nations. For example, whether refugee law is a distinct discipline within international law, or rather a part of human rights law, makes a difference as to how these laws are interpreted. Laws relating to refugee rights use language about such laws applying in the territory of the Contracting State.[39] The territorial limits included in the Convention Relating to the Status of Refugees have been interpreted narrowly by Contracting States. For example, the U.S. Supreme Court, in a narrow

36. *See, e.g.*, Tarik Abdel-Monem, *How Far do the Lawless Areas of Europe Extend? Extraterritorial Applications of the European Convention on Human Rights*, 14 J. TRANSNAT'L L. & POL'Y 159, 173 (2005).

37. This jurisdiction must "not offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Wash., 326 U.S. 310, 316 (1945).

38. *See generally* KENNETH ABRAHAM, CONCISE RESTATEMENT OF TORTS (2000); CONTRACT LAW TODAY: ANGLO-FRENCH COMPARISONS (Donald Harris & Denis Tallon eds.,1989); EUROPEAN GROUP ON TORT LAW, PRINCIPLES OF EUROPEAN TORT LAW (Springer-Verlag/Wien 2005); EUROPEAN PRODUCT LIABILITY (Rebecca Attree & Patrick Kelly eds., 1992); FOWLER V. HARPER ET AL.,THE LAW OF TORTS (2005); William M. Sage, *Enterprise Liability and the Emerging Managed Health Care System*, 60 LAW & CONTEMP. PROBS. 159 (1997).

39. Convention relating to the Status of Refugees art. 10, 40, Jul. 28, 1951, 19 U.S.T. 6577, 189 U.N.T.S. 150.

interpretation of refugee law as traditional international law, as opposed to a part of human rights law, found that detention of Haitians in Guantanamo, Cuba, was not covered by the Refugee Convention, since that would be an "uncontemplated" extraterritorial obligation.[40] Viewing the Refugee Convention as protecting the human rights of individuals first, rather than as simply an agreement between states, would have resulted in a different decision that protected the rights of the refuge-seeking Haitians.[41]

Again, human rights law focuses on the rights of individuals and the core protection or essence of the law is to protect people.

Human rights law is not humanitarian law, with all its jurisdictional definitions. Humanitarian lawyers spend countless hours in mental contortions attempting to either show how humanitarian law applies or does not apply to a particular circumstance.[42] Is it an international conflict? Where the participants engaged in combat? Were they wearing uniforms? And recently, is he or she an enemy combatant? Such a practice appears to help these lawyers comfort themselves that humanitarian law is really law.

Human rights apply and belong to humans. Although this may be a stark and sweeping statement, this is the nature of the law, and this is why human rights law now applies to non-state actors,[43] to corporations and in the private sphere (e.g., discrimination).[44] It is out of step with these developments, which represent the essence of human rights law, to limit the extraterritorial application of human rights law and to presume that only one state may be held responsible for violating an individual's rights. To some degree these limits have been based on the desire to avoid the difficult task of evaluating government policy in a war abroad. In addition, the international law state-based approach appears to limit the inquiry to one state at a time. In the main, though, limitations are due to an enculturation from humanitarian law/traditional international law, where we review the actions of one state at time and where some sort of jurisdictional hurdle must be crossed before the law applies. Human rights law is relevant when an individual's rights are violated.

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40. Sale v. Haitian Centers Council, Inc., 113 S. Ct. 2549, 2564 (1993) *cited in* Gerald Neuman, *Extraterritorial Violations of Human Rights by the United States*, 9 AM UNIV. J. INT'L L. & POL'Y 213, 219 (1993).

41. Gerald Neuman, *Extraterritorial Violations of Human Rights by the United States*, 9 AM UNIV. J. INT'L L. & POL'Y 213, 219 (1993).

42. A clear example of this is US government lawyer efforts to show that somehow humanitarian law does not apply to its war on terror. For an effective critique of this mental yoga *see* Human Rights Watch, *Briefing Paper, International Humanitarian Law Issues In A Potential War In Iraq* (Feb. 20, 2003), *available at* http://www.hrw.org/backgrounder/arms/iraq0202003.htm (last visited Jan 30, 2007).

43. Nigel S. Rodley, *Can Armed Opposition Groups Violate Human Rights? in* HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE 297 (Kathleen E. Mahoney et al. eds., 1993).

44. *See, e.g.*, ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (1996); Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations Accountable to Domestic and International Standards*, 10 TEMP. INT'L & COMP. L.J. 123 (1996); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

E. Duty to Act

General principles of tort, contract and criminal law create a number of situations requiring an affirmative duty to act, including: A duty to act may be based in the relationship of the parties (e.g. parent to child, pilot to passenger) or in contract; a duty based in a voluntary assumption of care; a duty arising from the fact that a person created a risk from which a need for protection arose (e.g., the Good Samaritan principle, where no duty exists to intervene, but once a person intervenes she has a duty to intervene appropriately); a duty arising from a special relationship that makes the non-acting partner criminally responsible for the actor's criminal action (e.g. one person beats the other and leaves the victim lying on the ground injured); a duty can arise from the fact that one owns the real property upon which the victim is injured; the duty to act and the resulting criminal liability for failing to act, based upon statute.[45]

Borrowing and applying these general principles of law to instances of states intervening in another state in any way (from invasion, to peacekeeping, to development work), a duty would often exist.

Perhaps the strongest basis to assert a duty is the Good Samaritan principle, given states would argue that they had no duty in the first place to intervene. Just as in general principles of law, a Good Samaritan has no obligation to intervene, but if he or she does, he or she is held to certain legal obligations.

Another basis for an affirmative duty could be asserted depending on the circumstance. For example, considering Chapter IX of the UN Charter and various human rights agreements,[46] it could be argued that a contractual or statutory duty exists. Or where a state has intervened in another country, for example militarily or economically, and damage has been done, a duty could arise.

The idea is established rhetorically and intellectually that a human rights duty applies to protect the "target beneficiaries" of international actors involved in development projects. This understanding, however, has yet to be accepted and/or operationalized by most states and other international actors. It is notable that on paper the World Bank already recognizes this:

> Human rights foster accountability of all actors involved in development by locating duty for particular development outcomes on duty-bearers (usually States). This advances accountability to the poor and a consequent empowerment of the poor. In short, human rights improve the processes through which development occurs for those it is designed to benefit.[47]

45. *See, e.g.*, David C. Biggs, *The Good Samaritan is Packing: An Overview of the Broadened Duty to Aid your Fellowman, with the Modern Desire to Possess Concealed Weapons*, 1997 U. DAYTON L. REV. 225, 229-230 (1997).

46. U.N. Charter art. 55-60.

47. Robert Danino, Legal Opinion on Human Rights and the Work of the World Bank, para. 2 (Jan. 27, 2006) (on file with the Denver Journal of International Law and Policy).

F. An Agent or Sub-contractor Cannot Avoid Legal Obligations

In general principles of law, it is clear, whether that under contract, agency or tort law, that an individual or entity cannot escape legal responsibility by forming an association with others. In these cases, one is held to be liable for the acts or omissions of the other.

Similarly, international organizations have human rights obligations, and entities that created these organizations do not escape liability by acting through the international organization:

> International organizations are entities created by states delegating power to achieve certain goals and perform specified functions.... It would be surprising if states could perform actions collectively through international organizations that states could not lawfully do individually.[48]

> [I]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law.[49]

Case law interpreting the European Convention of Human Rights has consistently held states to be responsible for their actions, regardless of the banner or entity through which such actions were carried out.[50] For example, it would be incompatible with the purposes of the European Convention to absolve states from responsibility when acting through international organizations.[51]

IV. SPECIFIC HURDLES

Ending obligations to respect human rights at a nation's borders severely limits human rights law's capacity to effectuate positive change. This interpretation is anachronistic and flows against an actual trend of globalization of commerce as well as conflicts. Our present world is amazingly interconnected. Corporations have obligations to respect human rights wherever they operate; so how, when human rights principles apply in the private sphere across borders, can countries claims that only a host state has human rights obligations, and that human rights obligations that apply domestically do not apply when that country is working in another, either directly or through an agent (e.g., UN, OAS or World Bank)?[52] Some aspects of this issue have received academic attention.[53]

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48. Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT'L & COMP. L. REV. 273, 309 (2002); *see also* Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11).

49. Interpretation of the Agreement of March 25, 1951 Between the WHO and Egypt, 1980 I.C.J. 73, 89 (Dec. 20).

50. Michael Kearney, *Extraterritorial Jurisdiction of the European Convention on Human Rights*, 5 TRINITY C.L. REV. 126, 139 (2002).

51. Waite and Kennedy v. Germany, 30 Eur. Ct. H.R. 261, 262 (1999).

52. For example, both home and host states have an obligation to regulate multinational corporations. *See, e.g.*, Shelton, *supra* note 48. It is a general principle that those with power must be accountable for the way in which they exercise it. International organizations have developed limited and limiting ways to hold themselves to account. *See, e.g.*, Daniel D. Bradlow, *Private Complainants*

There is a growing understanding of the application of human rights law to individuals serving in international operations. For instance, human rights principles proscribe "blue helmets" from torturing or raping those they have been sent to protect.[54] At the same time, mechanisms to create accountability for these violations are underdeveloped.[55]

An understanding of how human rights law should be considered in how Member States organize their interventions in another country and how human rights law provides a vehicle for accountability related to money spent is also underdeveloped and requires further attention.[56] It should be noted that Zanmi Lasante/Partners in Health, the Robert F. Kennedy Memorial Center for Human Rights, and the International Human Rights Clinic at the New York University School of Law requested and received a hearing on the human rights obligations, specifically economic and social rights, members of the OAS have when implementing projects in Haiti.[57] The purpose of the hearing was to remind the Commissioners of the confusion regarding this issue and the ripeness for further clarification.

A. Extraterritorial Application of Human Rights Law

Extraterritorial responsibility has been well established in international law for decades. The seminal case, the Trail Smelter Arbitration, held that: "no state has the right to use or permit the use of *its* territory in such a manner as to cause injury... in or to the territory of another" (emphasis added).[58]

Do these principles also apply to human rights violations arising from decisions taken in one country that result in actions carried out in another? A

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and International Organizations: a Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions, 36 GA. J. INT'L & COMP. L. 403 (2005).

53. Professor Ved Nanda has been sitting on a Committee of the International Law Association that has been grappling with this topic already for a number of years and has already caught the wave in a recently published article. *See* Ved Nanda, *Accountability of International Organizations – Some Observations*, 33 DENV. J. INT'L L. & POL'Y 379 (2005).

54. *See, e.g.,* Murphy, *supra* note 20, at 531-46.

55. Some scholars see a more gradual acceptance by the UN and Member States of their human rights obligations, for example when acting as a quasi-sovereign. *See, e.g.,* Frederic Megret and Florian Hoffmann, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 HUM. RTS. Q. 314 (2003).

56. Some scholars believe the general principles of state responsibility apply to human rights law and that the host state would be justified in approaching the intervening state for compensation for the violation of the rights of its citizens. The logical extension of this argument is that Haiti could bring a case in the ICJ against various states for violating the economic and social rights of its citizens. *See, e.g.,* Danwood Mzikenge Chirwa, *The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights*, 5 MELB. J. INT'L L. 1, 26-27 (2004).

57. *Statement of Partners in Health/Zanmi Lasante* before the Inter-American Commission on Human Rights (March 3, 2006), *available at* http://www.rfkmemorial.org/human_rights/2002_Loune/PIHStatement.pdf.

58. *The Smelter Arbitral Tribunal Decision*, 35 AM. J. INT'L L. 684, 684 (1941), *quoted in* Rebecca M. Bratspies, *Trail Smelter's (Semi)Precautionary Legacy* (2006), *in* REBECCA M. BRATSPIES, TRANSBOUNDARY HARMS IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION, (Rebecca M. Bratspies & Russell Miller, eds., Cambridge University Press 2006).

number of forums and scholars have argued that this should be the case. Many scholars argue that decisions against the extraterritorial application of human rights law is anathema to the effective protection of individual rights, the very purpose of human rights law.[59]

Notably, states actually take interest in the impact of their corporate actors abroad (e.g., product liability)[60] or acts of individuals (e.g., pedophiles, money launderers, tax dodgers) and international humanitarian law attaches to the actor, not the place.[61] Yet, human rights NGOs and advocacy groups have not spent a lot of time looking at the extraterritorial impact of state actions. One author has said, "[g]reater commitment is needed to the complex and broad-ranging business of transforming the political culture both nationally and internationally in order to create greater transparency and accountability in relation to state actions overseas."[62]

The human rights advocate's position, and one that has significant theoretical support, is that it is unconscionable to interpret human rights treaty obligations in such a way that would permit the violation of human rights by a Contracting Party extraterritorially, but find that same violation condemnable when done in its own territory.[63]

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59. *See, e.g.*, Theodor Meron, *Extraterritoriality of Human Rights Treaties*, AM. J. INT'L L. 78, 82 (1995). *See also* John Creone, *Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo*, EUR. J. INT'L L. 469, 475 (2001).

60. In fact, some have argued that various states, including the US, have gone too far in asserting extraterritorial jurisdiction or application of their laws in other countries. (This is a far cry from the US position on the application of human rights to their actions extraterritorially.) *See, e.g.*, Note, *Extraterritorial Application of the Export Administration Act of 1979 Under International and American Law*, 81 MICH. L. REV. 1308, 1309 (1983); *see also* Jerry W. Cain, Jr., *Extraterritorial Application of the United States' Trade Embargo Against Cuba: The United Nations General Assembly's Call for an End to the U.S. Trade Embargo*, 24 GA. J. INT'L & COMP. L. 379, 380 (1994); *see generally* Note, *Constitutional Law – Extraterritorial Application of the Fourth Amendment to Actions Taken by or at the Direction of United States Agents Against Aliens Residing in Foreign Nations*, 21 WAYNE L. REV. 1473, 1479 (1974-1975) *and* Randall L. Sarosdy, Comment, *Jurisdiction Following Illegal Extraterritorial Seizure: International Human Rights Obligations as an Alternative to Constitutional Stalemate*, 54 TEX. L. REV. 1439, 1468 (1975-1976) (discussing the ebb and flow of the extraterritorial application of the individual rights guaranteed in the U.S. Constitution); *see also* Angela Fisher & Margaret Satterthwaite, *Beyond Guantanamo: Transfers to Torture One Year After Rasul v. Bush*, CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, June 28, 2005, *available at* http://www.nyuhr.org/docs/Beyond%20Guantanamo%20Report%20FINAL.pdf (providing a more recent example of the ebb and flow of the extraterritorial application of the individual rights guaranteed in the U.S. Constitution).

61. *See, e.g.*, Dino Kritsiotis, *The Kosovo Crisis and NATO's Application of Armed Forces Against the Federal Republic of Yugoslavia*, 49 INT'L & COMP. L.Q. 330 (2000).

62. Ralph Wilde, *Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, MICH. J. INT'L L. 739, 770 (2005).

63. Michael Kearney, *Extraterritorial Jurisdiction of the European Convention on Human Rights*, 5 TRINITY C. L. REV. 126, 126-129 (2002).

The issue has been litigated often in the European Court on Human Rights. These cases turn mainly on the definition of "jurisdiction" found in article 1 of the European Convention.[64]

There have been many critiques of the European Court's approach to extraterritorial application of the Convention, a number of which show what appears to be somewhat inconsistent judgments that tend to support the idea that the Court has placed the higher interests of the State Parties above examining serious human rights violations.[65] Cases against Turkey and Russia have tended to support the extraterritorial application, while cases against core European states do not.[66]

In the context of the Turkish occupation of Cyprus, the Court stated: "[A] Contracting State to the Convention could not, by way of delegation of powers to a subordinate and unlawful administration, avoid its responsibility for breaches of the Convention, indeed of international law in general."[67]

The term 'jurisdiction' is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory.[68]

One line of cases clearly does not limit jurisdiction to territorial boundaries and uses the "effective control" or "degree of control" test based on power or authority to determine if the European Convention should be applied extraterritorially.[69]

In the *Bankovic* case, plaintiffs attempted to hold states responsible for a bombing in Belgrade by NATO forces, but the Court narrowed the applicability of the Convention extraterritorially to the territories of the Contracting States. By taking this tack, the Court avoided the more interesting question regarding the degree State Parties are responsible for actions carried out within the framework of NATO.[70]

> ...[T]he Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in

64. "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention." Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Apr. 11, 1950, 213 U.N.T.S. 221.

65. *See, e.g.*, Kearney, *supra* note 63 at 126-157 (providing an analysis of several decisions of the European Court regarding the extraterritorial application of international human rights laws).

66. Some scholars have pointed to the odd development of jurisprudence in this area as related to Europe's colonial past. Louise Moor & A.W. Brian Simpson, *Ghosts of Colonialism in the European Convention on Human Rights*, 76 BRIT. Y.B. INT'L L. 121 (2005).

67. Cyprus v. Turkey, App. No. 25781/94, Eur. Ct. H.R., para. 71 (May 10, 2001).

68. Drozd & Janousek v. France & Spain, 240 Eur. Ct. H.R. (ser. A) at 91 (1992); *See also* Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) at 62 (1995).

69. *See* Cyprus v. Turkey *supra* note 69 at 71; Loizidou v. Turkey *supra* note 68 at 62; Ocalan v. Turkey, App. No. 46221/99, Eur. Ct. H.R. (2003); Issa v. Turkey, App. No. 31821/96, Eur. Ct. H.R. (2004); Ilascu v. Moldova & Russia, App. No. 48787/99, Eur. Ct. H.R (2004).

70. *See, e.g.*, Alexandra Ruth & Mirja Trilsch, *International Decision: Bankovic v. Belgium (Admissibility)*, 97 AM. J. INT'L L. 168, 172 (2003).

> the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.[71]

Although this reading of the European Convention moves away from extraterritorial application, the "*espace juridique*" concept would reinforce the notion that regional human rights instruments apply throughout the territories of the Contracting States. Taking this line of thinking a logical step further, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) were designed to apply throughout the world, so it is not a stretch to define "*espace juridique*" to be global.[72]

In matters related to extraterritorial application of the American Convention on Human Rights, the Inter-American Commission has taken a position that is conceptually consistent with the essence of human rights law. It has held: "[g]iven that individual rights inhere simply by virtue of a person's humanity, each American state is obliged to uphold the protected rights of any person subject to its jurisdiction."[73] This appears to mean that all OAS Members are bound by Inter-American human rights law when intervening in Haiti.

The Inter-American Commission for Human Rights has also specified the non-nationality basis for conceiving human rights.[74] If human rights law cannot support a distinction between nationals and foreigners domestically, should it be able to do so extra-territorially?

Perhaps most important for the purposes of this article, the "jurisdiction" limitation that exists in the European Convention, the ICCRP and the American Convention on Human Rights is conspicuously absent in the International Covenant on Economic, Social and Cultural Rights. Article 2 begins:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available

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71. Bankovic v. Belgium, App. No. 52207/99, 2001-XII Eur. Ct. H.R. 333 para 80 (Dec. 12, 2001).

72. It should be noted that the Human Rights Committee has not been so expansive in its view of extraterritorial application. In its General Comment 31 on Article 2 it stated, "that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party." U.N. Human Rights Comm., *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, ¶ 10, U.N. Doc CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

73. Coard v. United States, Case 10.951 Inter-Am. C.H.R., Report No. 109/99 OEA/Ser.L/V/II.106, doc. 3 rev. ¶ 37 (1999).

74. Wilde, *supra* note 62, at 791.

> resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[75]

It should be noted that only article 14 of the ICESCR specifies that each State Party must have a plan for securing free primary education in its territory or under its jurisdiction. Otherwise, the ICESCR requires international cooperation to achieve the rights of the Convention in all State Parties.

The Committee on Economic and Social Rights clarifies this point:

> The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard.[76]

This certainly can be read as an attempt to create an obligation to provide foreign assistance, but it also supports the idea that if a state or states choose to intervene in another nation, the intervening states continue to be bound by the Covenant. In another General Comment, the Committee mandates that the rights of Covenant be considered by State Parties in their international work. These statements underscore the applicability of the ICESCR extraterritorially:

> The second principle of general relevance is that development cooperation activities do not automatically contribute to the promotion of respect for economic, social and cultural rights. Many activities undertaken in the name of "development" have subsequently been recognized as ill-conceived and even counter-productive in human rights terms. In order to reduce the incidence of such problems, the whole range of issues dealt with in the Covenant should, wherever possible and appropriate, be given specific and careful consideration.[77]

> Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenants are duly taken into account. This would apply, for example, in the initial assessment of the priority needs of a particular country, in the identification of particular projects, in project design, in the implementation of the project, and in its final evaluation.[78]

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75. International Covenant on Economic, Social and Cultural Rights art. 2, Dec. 19, 1966, 993 U.N.T.S. 3.

76. U.N. Comm. on Econ., Soc. & Cultural Rights [CESCR], *General Comment 3: The Nature of States Parties Obligations (Art. 2, par.1 of the Covenant)*, ¶ 14, U.N. Doc. 14/12/90 (Dec. 14, 1990).

77. U.N. Comm. on Econ., Soc. & Cultural Rights [CESCR], *General Comment 2: International Technical Assistance Measures (Art. 22 of the Covenant)*, ¶ 7, U.N. Doc. 02/02/90 (Feb. 2, 1990).

78. *Id.* at ¶ 8(d).

The extraterritorial application of Contracting Parties obligations under the Covenant of Economic, Social and Cultural Rights is much clearer than that under the European Convention and the International Covenant of Civil and Political Rights and clearer than the Inter-American Convention on Human Rights.

B. Marginalization of Economic and Social Rights

Economic, social and cultural rights (ESCR) have been marginalized in practice.[79] Many governments and a number of leading NGOs see economic rights more as the equivalent of letters to Santa Claus rather than as justiciable rights.[80] A few states, like the US, still cling to the outdated notion that human rights are limited to civil and political rights.[81] But we in the advocacy community also are part of the problem.[82] Our focus on civil and political rights has helped to marginalize ESCR. Importantly, violations of ESCR affect women disproportionately since women tend to be marginalized in terms of political power, there may be a correlation.[83]

Up to now, most discussions (both academic and in the European Court of Human Rights (ECHR) and Inter-American Commission on Human Rights (IACHR)) of the extraterritorial application of human rights law have related to civil and political rights. The marginalization of ESCR can be seen from this fact, especially considering the distinct wording between the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which favors the extraterritorial application of ESCR rights.

Many countries, like Canada and Brazil, have developed very sophisticated ways of measuring positive change in the level of respect for ESCR.[84] When intervening abroad, these countries should bring this experience with them in order

79. Human rights as implemented today can mask power relations. While economic and social rights have been marginalized, market attributes have been formalized through the WTO. *See* Tony Evans, *International Human Rights Law as Power/Knowledge*, 27 HUM RTS. Q. 1046 (2005).

80. "Right to Health," 6 *Human Rights Features* 1 (31 March – 1 April, 2003). For an alternative view of the justiciable nature of economic, social and cultural rights, *see* Trinidad Antonio Cancado, "A Justicabilidade dos Direitos Economicos, Socias e Culturias no Plano Internacional," in Volio Jimenez Collection 171 (2002) (on file with author).

81. Rhoda Howard, *The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa*, 5 HUM. RTS. Q. 467, 468 (1983).

82. *See* Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 HUM. RTS. Q. 63 (2004); Leonard S. Rubenstein, *How International Human Rights Organizations Can Advance Economic, Social and Cultural Rights: A Response to Kenneth Roth*, 26 HUM. RTS. Q. 4 (2004).

83. *See* Joe Oloka-Onyango, *Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for People's Rights in Africa*, 18 AM. U. INT'L L. REV. 851, 876-79 (2002-2003).

84. *See, e.g.*, Todd Landman, *Measuring Human Rights: Principle, Practice and Policy*, 26 HUM. RTS. Q. 906 (Nov. 4, 2004); Katarina Tomasevski, *Measuring Compliance with Human Rights Obligations*, *in* HUMAN RIGHTS IN DOMESTIC LAW AND DEVELOPMENT ASSISTANCE POLICIES OF THE NORDIC COUNTRIES, 109 (1989); Robert E. Robertson, *Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights*, 16 HUM. RTS. Q. 693 (1994).

to demonstrate whether money being spent is actually improving the human rights situation.[85]

There is a growing understanding of the many ways of viewing and working internationally. But too often when viewing human rights problems, we borrow only from the criminal aspect of the law and forget about its social justice component, and thereby fail to include a focus on the obligations to improve the economic, social and cultural reality of the people in the country where the international entities are intervening. Often, for example, in the field of transitional justice, economic, social and cultural rights are marginalized.[86]

Peacekeeping and peacebuilding efforts are lagging well behind in terms of measuring their impact on ESCR. Whereas human rights are normally included in the report of the Secretary General to the Security Council related to a specific peacekeeping operation, these reports almost always focus on civil and political rights and contain minimal if any discussion of ESCR.

C. Multi-State Responsibility

Roman law offers one of the first examples of how a legal system is renovated under the influence of equitable ideas.[87] It is time for our thinking about multi-state responsibility for violations of economic and social human rights to be renovated.

In general principles of law, for example, we find co-defendants and co-conspirators in criminal law, and joint enterprises and joint enterprise liability in civil law.[88] Many actors (e.g., States, multilateral organizations and NGOs) are part of the joint enterprise of bringing sustainable peace and the respect of the full spectrum of human rights to Haiti. There should be shared responsibility and accountability.[89] Not only general principles of law, but general principles of international law support this position.[90]

The Committee on Economic, Social and Cultural Rights has already held that if states fail to abide by their obligations in the Covenant when entering bilateral or multilateral agreements they can violate their obligations under the Covenant.[91] It

85. Tools have been created that are useful in determining if a state is taking steps to the maximum of its available resources. *See, e.g.*, Claudio Schuftan, *Dignity Counts: A Guide to Using Budget Analysis to Advance Human Rights*, 27 HUM. RTS. Q. 134 (2005).

86. Louise Arbour, United Nations High Comm'r for Human Rights, Economic and Social Justice for Societies in Transition (Oct. 25, 2006), *available at* http://www.ictj.org/en/news/features/1025.html.

87. Schermaier, *supra* note 1 at 65.

88. *See, e.g.*, Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1266-1380 (1996-97).

89. More has been written on obligations of UN and multilateral entities than holding multiple states responsible for the same violation; however, more work is needed to flush out how states must abide by their human rights obligations while acting collectively. *See, e.g.*, Cerone, *supra* note 59; Kritsiotis, *supra* note 61.

90. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 15 (Jan. 29). *See, e.g.*, Salomon and Sengupta, *supra* note 19.

91. Comm. on Econ., Soc. and Cultural Rights [CESCR], General Comment 14, *The Right to the*

is a logical step to consider states bound by the Covenant in the implementation of these agreements. States are individually and collectively bound by human rights law. The question remains as to how to achieve acceptance of this principle. In the case of "decisions... made collectively, one cannot disaggregate such actions and attribute them to individual member States. Member States are then obliged to discharge their obligations undertaken *qua* members pursuant to those collective decisions, and will be held... responsible under international law for the breach thereof."[92]

Despite some developments, human rights law and accountability for violations still have not evolved to hold multiple actors liable. We are very much still in the state-citizen mode in terms of the application of human rights law. This is true despite the fact that the reality on the ground is complex, multidimensional and involves many actors. In places like Haiti, where the government was not trusted or had a limited capacity to absorb funds from international donors, a different way of looking at human rights obligations needs to be developed. Importantly, in Haiti, most money flows from a donor directly to NGOs or corporations (implementing projects approved by the donor), but yet the government of Haiti is held responsible for improving the human rights situation and is accountable for whether these projects – which the Government has very little influence over – actually benefit the people. Something is wrong with this picture: the UN peacekeeping mission to Haiti, the OAS mission, the Inter-American Development Bank, World Bank and all the Member States' missions and projects to Haiti, NGOs and corporations, are all exponentially better resourced than the Government.

Numerous entities exercise some power and impact the lives of Haitians. In multiple ways, the relative power of each entity should be examined when determining levels of responsibility to respect and promote the human rights of the Haitians. Interestingly, all of those entities, except corporations, would accept that one of their missions is to improve the human rights situation in Haiti. The problem is that the expectation and measurement of each entity's contribution to improving the human rights situation remains undeveloped. All accountability still flows to the entity considered by many to be corrupt and ineffective – the Haitian government—while the Member States and their agents enjoy moral high ground and no accountability. Even "do gooders" need to examine carefully to see if their work is actually producing a human rights benefit, including the human rights components of UN mission.[93]

Highest Attainable Standard of Health, ¶ 50, U.N. DOC. E/C.12/2000/4 (2000); Comm. on Econ., Soc. and Cultural Rights [CESCR], General Comment 12, *Right to Adequate Food*, ¶ 19, U.N. DOC. E/C.12/1999/5 (1999).

92. U.N. ECON. & SOC. COUNCIL [ECOSOC], Sub-Comm. on the Promotion and Prot. of Human Rights, *Progress Report: Globalization and Its Impact on the Full Enjoyment of Human Rights*, ¶ 58, U.N. DOC. E/CN.4/Sub.2/2001/10 (Aug. 2, 2001) (*prepared by* Joseph Oloka-Onyango and Deepika Udagama).

93. Kennedy, *supra* note 35, at 108.

Even if huge projects could not be completed within the next few years, many projects could be implemented that would help transform lives and give the Haitian people some control and influence over the resources being spent in their name. This, in and of itself, is mandated by human rights law. Political participation in the decisions affecting the Haitian people is fundamental in human rights law. Why it can be ignored at a time of crisis is far from clear, especially when it is the people's participation and empowerment that can help to build the basis for a sustainable peace through laying the foundation for good governance.

It is not simply the international intervenors' responsibility; obviously the host Member State has significant obligations, but it is past due to begin a process to define that each intervenor has human rights obligations and those obligations need to be considered in the way interventions are structured and their impact measured.

Rights also have addressees who are assigned duties or responsibilities. A person's human rights are not primarily rights against the United Nations or other international bodies; they primarily impose obligations on the government of the country in which the person resides or is located. The human rights of citizens of Belgium are mainly addressed to the Belgian government. International agencies, and the governments of countries other than one's own, are secondary or "backup" addressees. International human rights organizations provide encouragement, assistance, and sometimes criticism to states in order to assist them in fulfilling their duties.[94]

A growing acceptance of the responsibility to protect highlights the significance of "backup" responsibility: the principle makes it an obligation of UN Member States to intervene to end massive human rights violations.[95]

Contemporary practice makes it hard to see how states other than the primary state have duties in a Hohfeldian sense, but such practice is out of step with other areas of law that clearly contemplate multiple duty holders. There is nothing in human rights law that prevents us from using a similar analysis. In fact, the call for state cooperation to achieve full respect for human rights seems to highlight the duty. "Starting with a human act, we must next find a causal relation between the act and the harmful result; for in our law – and it is believed in any civilized law – liability cannot be imputed to a man unless it is in some degree a result of his act."[96]

The main hurdle is the means for moving from a lack of an obligation to intervene in another country, for example, when the responsibility to protect does not exist and the recognition of a duty on states that voluntarily intervene in another country. In this case, we can simply borrow from the general principles of

94. James Nickel, *Human Rights,* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, Fall 2006, http://plato.stanford.edu/entries/rights-human/ (emphasis excluded).

95. *See, e.g.,* Mukesh Kapila, United Nations Humanitarian Coordinator in Sudan, The Responsibility to Protect: Moving from Words to Action (Jan. 25, 2006), *available at* http://www.aegistrust.org/index.php ?option=comcontent&task=view&id=318&Itemid=147.

96. Joseph Beale, *The Proximate Consequences of An Act*, 33 HARV. L. REV. 633, 637 (1920).

law. Just as in the case of the Good Samaritan, there may be no duty to intervene, but the act of an intervention, or voluntary operation in another state, creates legal duties to respect human rights law.

Once we get over the duty hurdle, it is also not clear what standard should be applied. Until now, states could point to their good intentions as a reason why they should not be held responsible. However, given that *mens rea* or bad intention is only required in some cases of criminal law, other standards need to be looked at, such as recklessness, negligence and strict liability. In many ways a violation of human rights law is a *malum prohibitum* or a prohibited wrong. When such a wrong happens the parties involved are liable. This should be the case in human rights law.

Once a violation of human rights can be demonstrated, liability and responsibility should be divided based on relative power and ability to have ended the violation.

V. RECOMMENDATION/CONCLUSION

Recently, member states of the UN, including most notably the United States, have been preoccupied with the concept of the UN's accountability. But what is needed is accountability to the UN's guiding principles rather than to the agenda of particular Member States.

Further defining the extent of states' human rights obligations when intervening in other states will help to improve transparency, accountability and effectiveness of these interventions. It is hoped this article will create more interest in this area.

The IACHR examination of multi-state responsibility for extraterritorial violations of economic, social and cultural rights of Organization of American States Member States is an important step in the direction of formalizing a new understanding of what human rights duties are held by states voluntarily intervening in other state. Hopefully, the IACHR will help clarify the legal obligations that do in fact exist.

Once there is a growing understanding of this responsibility, the heavy lifting will be the operationalization of this obligation when Member States and their agents (e.g., UN and World Bank) operate in another country.

GLOBALIZATION, COMMUNITIES AND HUMAN RIGHTS: COMMUNITY-BASED PROPERTY RIGHTS AND PRIOR INFORMED CONSENT

DANIEL BARSTOW MAGRAW
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I. INTRODUCTION

Globalization is placing increasing stress on individuals and communities, particularly in rural areas in developing countries. Increased trade and other economic activities, for example, result in higher demand for wood and other forest products, oil and other minerals, fish products, arable land, etc. – resources that indigenous and other local communities often depend upon for their livelihoods and cultures. Large-scale development projects such as dams, mines and highways often displace local populations, exploit their natural resource base, and interfere with or destroy their livelihoods and cultures.[2] Even new protected areas such as national parks – terrestrial and maritime – often displace local populations or restrict their access to land and resources on which they traditionally rely.[3]

Local communities often are unable to protect themselves in the face of these pressures. There are various reasons for their vulnerability, ranging from limitations in resource mobilization or technical expertise to more structural issues of political opportunity and power dynamics. Many communities lack knowledge or experience in mobilizing resources to defend their rights, such as technical, scientific or legal expertise, or other helpful skills such as how to use the media. At the most basic level, communities may not have access to a base of resources,

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2. *See, e.g.*, JOAN MARTINEZ-ALIER, THE ENVIRONMENTALISM OF THE POOR (Edward Elgar Publishing, 2002).

3. *See, e.g.*, Mac Chapin, *A Challenge to Conservationists*, 17(6) World Watch. 17, 17-31 (2004); COLIN M. TURNBULL, THE MOUNTAIN PEOPLE 20-32, 129-39 (1972) (recounting how the society of the Ik people was destroyed as a result of their having been denied access to their traditional lands after the creation of Uganda's Kidepo Valley National Park).

like a place to meet, money for basic supplies such as copying and telephones, or technology such as computers and the internet. [4]

A more pervasive and structural problem is that rural people, while comprising a large majority in many developing countries, are frequently neglected, or even repressed, by national governments or local elites. A set of political variables, such as the openness of the political system, the State's capacity or propensity for repression, the stability of elite alignments, and the presence of elite allies all may influence the ability or limitations of a community to protect itself in the face of pressures.[5] Fundamental political and economic problems and the exploitation of the politically powerless often result in environmental injustices, including disparities in the benefits that flow from natural resources development.[6]

A related concern is that many nations continue to mirror the policies and biases of their former colonial governments, including land laws. In many countries, including in much of Asia and Africa, the State claims ownership of vast areas, including areas traditionally occupied by indigenous groups. Since political independence was attained in the 1960s by many African nations, State assertions of ownership have actually been broadened and legally strengthened in many nations.[7] In Indonesia, the State's authority over its resources since its independence has also been maintained and expanded, and in 1980s the State classified over 75% of the total land area as State Forest, including over 90% of the Outer Islands.[8] Given this pattern of State control of land and resources, local communities are often vulnerable to losing access to their traditionally occupied lands or resources, and thus to their means of sustenance, way of life, and culture.

This article addresses two related human rights norms that are emerging to counteract pressures being placed on vulnerable communities. The first of these is Community-Based Property Rights, which relate to the rights of long-established communities, especially indigenous ones, to manage and control natural resources they have traditionally utilized, and to maintain and adapt their often complex community rules and norms. The second is Prior Informed Consent by indigenous and other local communities with respect to the use of natural resources that they reside in or upon which they are otherwise dependent.

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4. *See, e.g.*, Joe Foweraker, *Theories of Social Movements*, *in* THEORIZING SOCIAL MOVEMENTS 16 (Pluto Press 1995). (Resource mobilization theory).

5. *See, e.g.*, *id.* at 18 (Political opportunity theory).

6. *See, e.g.*, Gary Bryner, *Assessing Claims of Environmental Justice: Conceptual Frameworks*, *in* JUSTICE AND NATURAL RESOURCES: CONCEPTS, STRATEGIES AND APPLICATIONS 31-56 (Kathryn Mutz et al. eds., 2002).

7. OWEN LYNCH, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, AMPLIFYING LOCAL VOICES, STRIVING FOR ENVIRONMENTAL JUSTICE: PROCEEDINGS OF THE AFRICAN PUBLIC INTEREST LAW AND COMMUNITY-BASED PROPERTY RIGHTS WORKSHOP, USA RIVER, TANZANIA, AUGUST 1 - 4, 2000 (Ctr. for Int'l Envtl. L 2002).

8. OWEN LYNCH & EMILY HARWELL, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW,WHOSE NATURAL RESOURCES? WHOSE COMMON GOOD? TOWARDS A NEW PARADIGM OF ENVIRONMENTAL JUSTICE AND THE NATIONAL INTEREST IN INDONESIA (Ctr. for Int'l Envtl. L., 2002).

Before describing these concepts, it is helpful first to recall the legal context in which these norms are emerging. The international legal system underwent a radical change at the end of World War II when the international community recognized the existence of human rights. This development was radical because for the first time subjects other than States had rights. Human beings had these rights solely by virtue of their being human. Moreover, they had these rights vis-à-vis their own State, for no longer could a State treat its nationals any way it liked with legal impunity.

As is well known, these rights were first recognized in 1948 in a non-binding declaration of the United Nations General Assembly – the Universal Declaration of Human Rights.[9] They later were established in two binding agreements – with the solemn name "covenants" – one on civil and political rights,[10] and the other on economic, social and cultural rights.[11]These and other rights have also been enshrined in a multitude of regional and specialized international agreements, including the European Convention for the Protection of Human Rights and Fundamental Freedoms,[12] the American Convention on Human Rights,[13] the African Charter on Human and Peoples' Rights,[14] the Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169),[15] the International Covenant on the Elimination of All Forms of Racial Discrimination,[16] the Convention on the Elimination of All Forms of Discrimination Against Women,[17] the Convention on the Rights of the Child,[18] and most recently, the Convention on the Rights of Persons with Disabilities.[19] Eventually, these human rights became recognized as customary international law,[20] some even reaching the status of *jus cogens*.[21]

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9. Universal Declaration of Human Rights, art. 3, G.A. res. 217A (III), at 71, U.N. Doc. A/810 at 71 (Dec. 12, 1948).

10. International Covenant on Civil and Political Rights, art. 27, Dec. 16, 1966, 999 U.N.T.S. 3171 (1976).

11. International Covenant on Economic, Social and Cultural Rights, art. 12, Jan. 2, 1976, 993 U.N.T.S. 3.

12. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Sept. 3, 1953, 213 U.N.T.S. 222 *as amended by* Protocols Nos. 3, 5, 8, and 11, which *entered into force* on Sept. 21, 1970, Dec. 20, 1971, Jan. 1, 1990, and November 1, 1998 *respectively*.

13. American Convention on Human Rights, art. 21, June 18, 1978, 1144 U.N.T.S. 123.

14. African Charter on Human and Peoples' Rights, art. 14, June 27, 1981, 21 I.L.M. 58.

15. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, International Labour Organization No. 169, *entered into force* Sept. 5, 1991, 72 I.L.O. Official Bulletin 59.

16. International Covenant on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195.

17. Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, 1249 U.N.T.S. 13.

18. Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3.

19. Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, U.N. DOC. A/61/611.

20. For a description of how this occurred with respect to the Universal Declaration of Human Rights, *see* Jo M. Pasqualucci, *Louis Sohn: Grandfather of International Human Rights Law in the United States*, 20 Human Rts. Q. 924, 939-940 (1998).

21. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702,

This area of human rights has continued to evolve over the half century since the Universal Declaration of Human Rights. For example, in the 1990s the international community finally recognized that these rights applied to women, not just men,[22] and human rights efforts have focused increasingly on rights of indigenous people.[23] More recently, the evolution of human rights has included environmental considerations,[24] recognizing, for example, that pollution can violate the rights to life and property.[25]

In 1992, the international community took a bold step towards acknowledging the link between human rights and environment by recognizing sustainable development as the overarching paradigm for improving the quality of life of people around the world through the adoption of the Rio Declaration on Environment and Development[26] and Agenda 21.[27] The importance of sustainable development has been recognized many times since adoption of the Rio Declaration.[28] Sustainable development has four defining characteristics: the interests of future generations must be taken into account; the needs of the world's poor must be given priority; the environment must be protected; and social, environmental and economic policies must be integrated.[29]

At about the same time, the environmental justice movement came to the fore in the United States when research by the Christian Science Monitor and others revealed that environmental hazards and pollution were disproportionately located in poor and minority areas, with race being the most significant predictor of the

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cmnt. n (AMERICAN LAW INSTITUTE, 1990).

22. Beijing Declaration and Platform for Action, Fourth World Conference on Women, Sept. 15, 1995, U.N. Doc. A/CONF. 177/20 (1995) and A/CONF. 177/20/Add.1 (1995). For a description of the role of civil society in reaching that realization, as well as a compilation of the 49 most significant international instruments leading up to the Beijing Declaration's recognition that women's rights are human rights, *see generally* C. LOCKWOOD ET AL., INSTRUMENTS OF CHANGE: THE INTERNATIONAL HUMAN RIGHTS OF WOMEN (ABA Press 1998).

23. *See, e.g.*, Vice President and Rapporteur, Report to the General Assembly on the First Session of the Human Rights Council, at 56-73, U.N. Doc. A/HRC/1/L.10 (June 30, 2006).

24. For early articles regarding that relationship, *see* Dinah. Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103, 103 (1991); Philip Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 612 (1984).

25. *See, e.g.*, San Mateo de Huanchor v. Perú, Petition 504/03, Inter-Am. C.H.R., Report No. 69/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004), discussed *infra* at text accompanying notes [40-42] [hereinafter San Mateo]. *See also* Mayagna (Sumo) Awas Tingni v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, at 25 (Aug. 31, 2001), discussed *infra* at text accompanying notes [37-39] [hereinafter Awas Tingi].

26. United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc.A/CONF.151/26 (June 25, 1993), 31 I.L.M.874 (1992).

27. United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, June 3-14, 1992, *Agenda 21*, U.N. Doc.A/CONF.151/26 (June 25, 1993).

28. *See, e.g.*, World Summit for Social Development, March 6-12, 1995, Copenhagen, Den., Copenhagen Declaration on Social Development, para. 6, U.N. Doc. A/CONF.166/9 (Apr. 19, 1995).

29. Daniel Magraw & Lisa Hawke, *Sustainable Development*, *in* OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 613 (Daniel Bodansky et al. eds. 2007).

location of hazardous facilities.[30] There is widespread agreement in the environmental justice movement that disadvantaged communities have a right to participate in decisions affecting them, that they should not bear a disproportionate environmental burden, and that they should share in the benefits of environmental protection, such as clean drinking water, sanitation, and access to parks. Environmental justice should also be viewed as requiring effective and equal access to justice by those injured by environmental degradation, as well as the protection of the environment sufficient to maintain a healthy quality of life.[31]

In 1991, the first national environmental justice event was held, in which environmental justice activists from the United States and other countries forged the "Principles of Environmental Justice", which are still looked to as a defining document of the movement.[32] The U.S. Environmental Protection Agency created an Environmental Justice office in 1992. The American Bar Association, which had endorsed sustainable development in 1992, adopted an environmental justice resolution in 1993.[33] Additionally, in 1994, President William J. Clinton signed an Executive Order on Environmental Justice, which declared that every federal agency should make "achieving environmental justice part of its mission by identifying and addressing... disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."[34]

As the movements for sustainable development and environmental justice progressed, it became increasingly evident that they were inextricably linked since they both addressed the confluence of social, environmental and economic factors, both required that the environment be preserved at a level sufficient to maintain a healthy quality of life, and both considered justice implications of development projects and processes.[35]

One set of instances where the search for environmental justice and sustainable development coincide is the treatment of long-established communities that are dependent on particular natural resources for their sustenance, their livelihood, their shelter, or their culture. This is the case, for example, with indigenous communities in the Amazon rainforest that depend on their

30. John Bryne et al., *A Brief on Environmental Justice, in* ENVIRONMENTAL JUSTICE: DISCOURSES IN INTERNATIONAL POLITICAL ECONOMY (John Bryne et al. eds., 2002).

31. Daniel Magraw & Owen Lynch, *One Species, One Planet: Environmental Justice and Sustainable Development, in* 2 WORLD BANK LEGAL REVIEW: LAW, EQUITY AND DEVELOPMENT 441, 442-45 (Ana Palacio ed., 2006).

32. For a discussion of The First National People of Color Environmental Leadership Summit, *see* David H. Getches & David H. Pellow, *Beyond "Traditional" Environmental Justice, in* JUSTICE AND NATURAL RESOURCES: CONCEPTS, STRATEGIES AND APPLICATIONS, (Kathryn M. Mutz et al. eds., 2002).

33. Policy Positions Adopted by ABA House of Delegates, Environmental Justice, Aug. 11, 1993, http://www.abanet.org/publicserv/environmental/environjus.shtml.

34. Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. Exec. Order No. 12898, 3 C.F.R. § 859 (1994), *reprinted in* 42 U.S.C.A. § 4321 at 7629-32 (1994).

35. *See* Magraw & Lynch, *supra* note 31.

surroundings for their way of life. In some communities in the Amazon, community members have reported using 30 different plant species for commercial sale alone, and many more forest materials for food and medicines, such as Brazil nuts for sale, palm fibers for clothes, seeds for oils, locust for medicine, heart of palm for food, etc., in addition to fishing and hunting for food.[36] Other examples include traditional coastal or river fishing communities that depend on fishing for their livelihoods, and communities that depend on rivers or lakes for their water. Unfortunately, as indicated above, these communities are often vulnerable to outside threats. Essentially, natural-resource dependent communities often are highly vulnerable to losing their land or access to resources.

Some threats can be addressed by using standard human rights mechanisms in international law. For example, the Awas Tingni case in the Inter-American Court of Human Rights addressed the violations of the right to property of the community by the Nicaraguan State, when Nicaragua granted a concession to a company to carry out road construction work and logging exploitation on Awas Tingni lands, without the consent of the Awas Tingni community.[37] The court spoke of the rights to property of the Awas Tingni, and other indigenous communities in Nicaragua and elsewhere, in their finding that "[i]ndigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival."[38] The Court ruled that the State had to adopt legislative, administrative, and other necessary measures to provide property title to the indigenous communities in accordance with their customary law, values, and customs.[39]

Another example of the application of standard human rights mechanisms is the San Mateo de Huanchor case in the Inter-American Commission on Human Rights (IACHR). This case addressed the environmental and health impacts from mining contamination in San Mateo de Huanchor, Peru.[40] The IACHR requested that Peru take precautionary measures, including taking steps to remove the tailings dump that was contaminating their community and the river on whose bank it was located, and to provide medical assistance to community members who had been harmed by the contamination.[41] As a result of the request of the Commission, the toxic mine tailings were removed and the State has taken some initial efforts to provide medical assistance to community members as of 2007.[42]

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36. Philip Fearnside, *Extractive Reserves in Brazilian Amazonia: An Opportunity to Maintain Tropical Rain Forest under Sustainable Use*, 39 BIOSCIENCE 387 (1989).

37. Awas Tingi, *supra* note 25.

38. *Id.* at para. 149.

39. *Id.* at para. 25. Another point of particular note by the Court was the finding that, given the significance of this relationship, indigenous peoples' customary law is adequate to support recognition of a property right even in the absence of State recognition of that right (para. 151).

40. San Mateo, *supra* note 25.

41. *Id.* at para. 12.

42. Another point of particular note is that the IACHR's decision highlights the linkage between pollution and human rights, the decision of the Commission sets a precedent to consider environmental

Sometimes, however, it is not possible to apply standard human rights doctrine or, in other instances, standard human rights mechanisms are inadequate. Community-Based Property Rights (CBPRs) and Prior Informed Consent (PIC) have emerged to fill this gap.

II. COMMUNITY-BASED PROPERTY RIGHTS

The term "community-based property rights" was first publicly invoked by the Center for International Environmental Law (CIEL) in 2000.[43] Among other things, the CBPR concept was designed to be useful in advocating on behalf of local communities and their legal rights to manage and control their natural resources.

CBPRs relate to the rights of long-established communities, including indigenous ones, to natural resources they have traditionally utilized. CBPRs also include the right to maintain and adapt the complex and dynamic rules and norms of their communities that often are formed over long periods of time in response to local environmental conditions.

In contrast to widely used and largely uniform Western concepts, CBPRs within any given local community typically encompass a number of different rights, including rights to ownership, use and transfer (including inheritance) of natural resources, all of which are understood and respected by a self-defined group of local people. CBPRs often include several distinct property rights within a community area, like private property that is owned by an individual or family, common property areas that can be accessed by all members of the community although not open to people outside of the community, and other types of property, such as areas that may be closed to any form of use in order to encourage regeneration of natural resources (e.g., forest or fish sanctuaries) or due to cultural reasons (such as sacred spaces). CBPRs can likewise include rights to land, wildlife, water, forest products, fish, marine products, and intellectual property. Furthermore, CBPRs may vary in time and place to include rights to seasonally available resources such as fruit, game, fish, water or grazing areas. They often specify under what circumstances and to what extent certain resources are available to individuals and communities to inhabit, to harvest, to hunt and gather on, and to inherit.

A key feature of CBPRs is that they derive their authority from the local community in which they originated and operate, not from the State where they are located. These rights emanate from and are enforced by communities. In this way, CBPRs are akin to human rights, which derive their authority from and are

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pollution or degradation, not as environmental management decisions, but as actions that violate human and community rights. The recognition of such linkages has been resisted by governments on the ground that pollution is a matter of environmental management, and that every State is sovereign to determine its levels of protection. The IACHR had earlier issued a report making the connection between pollution and human rights. *See* the Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, at Chapter VIII (1997).

43. Much of this section is drawn directly from LYNCH & HARWELL, *supra* note 8. Owen Lynch developed the concept of CBPRs while head of the CIEL's Law and Communities Program.

recognized by international law as well as by natural law concepts. International human rights law also forms a basis for CBPRs, because it recognizes basic civil and political rights essential to CBPRs, as well as other relevant rights such as the right to enjoy the benefits of culture.

CBPRs exist in many places throughout much of the Global South and are often distinguishable from Western property rights concepts, most notably private individual property rights. Where CBPRs exist, communities should be able to maintain these rights, including associated property and natural resources, particularly when the area is an ancestral domain or indigenous territory. Formal legal recognition of CBPRs by the State is important in this regard, and can help to ensure that CBPRs are respected and used in the pursuit of the public interest. Formal state recognition of these rights makes it more difficult for property and resources traditionally used by communities to be usurped, and recognizes the human rights of these communities to their livelihoods and culture. Formal State recognition of CBPRs also provides State assurance that local people will be better able to profit from investments of their time and labor, recognize local communities' authority to prevent migration into their territories, and help local communities better protect and maintain natural resources by bolstering the enforcement of local management regulations.

Legal recognition of CBPRs by States should be understood to be an aspirational and optimal goal, and while full legal recognition of CBPRs as private rights may not be the final outcome of a particular negotiation with States, it is important that long-marginalized local communities and persons who advocate on behalf of such communities know of and pursue an optimal ideal outcome. The first step to recognize and support CBPRs is for governments to acknowledge officially their responsibility to help resource-dependent communities defend and benefit from their natural resources and from their rights relating to the environment. In many countries, constitutions can be interpreted as already protecting the CBPRs of indigenous peoples (i.e., original long-term occupants). There are also procedural and substantive rights associated with the recognition of CBPRs.

Procedural rights include the right of communities to participate in decision making processes that affect them. These rights of participation are related to Prior Informed Consent (PIC), and will be discussed in the next section.

Substantive rights, the strongest form of State recognition of CBPRs, are achieved primarily through the creation of a legal presumption of local community ownership where CBPRs exist. An example of this is Certificates of Ancestral Domain Title, as provided in the Philippines, which will be described in more detail below as an example of how CBPRs and PIC have been legally recognized.

The ideal State-local community arrangement would be private property rights for the community. This would entail legal recognition of private group or community property rather than of individual or public property. Of course, individual rights already exist within most CBPR systems and are already well known to community members. These rights probably would and should endure,

although the community, and not necessarily the State, would remain the primary guarantor.

Despite being a departure from typical Western conceptions of property rights, such an arrangement would best capture the unique and dynamic nature of CBPRs. The main benefit that local communities would gain from being legally recognized as private group property rights holders would most likely be the increase in bargaining leverage with outside interests, including their own government. Moreover, in light of the property rights being group-held, decisions to sell any rights must involve the group, thereby limiting the vulnerability and "commodification" of the property rights.

In summary, the concept of CBPRs and the State's recognition of CBPRs are emerging innovations in the protection of human rights. Legally recognizing and supporting these rights will allow communities to continue to maintain their traditional ways in addition to better managing their interactions with and their adaptations into mainstream societies and economies. It helps protect their rights to livelihood and culture, and in doing so, safeguards their human rights.

III. PRIOR INFORMED CONSENT

PIC is another important innovation in the protection of the human rights of local communities in developing countries. PIC is generally defined as a consultative process whereby a potentially affected community engages in an open and informed dialogue with individuals or other persons interested in pursuing activities in the area or areas occupied or traditionally used by the affected community.[44] Discussions should occur prior to, and continue throughout, the time the activity is conducted.[45] Furthermore, communities should have the right to withhold consent at decision-making points during the project cycle.[46] Throughout the process, these communities should be able to gain a clear understanding of how they specifically will benefit or be harmed by proposed projects, and these projects will take into account cultural valuations of impacts or benefits and traditional modes of decision-making.[47]

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44. Much of this section is drawn from ANNE PERRAULT ET AL., PARTNERSHIPS FOR SUCCESS IN PROTECTED AREAS: THE PUBLIC INTEREST AND LOCAL COMMUNITY RIGHTS TO PRIOR INFORMED CONSENT (PIC) 19 Geo. Int'l Envtl. L. Rev. 475-542; *see also* Robert Goodland, *Free, Prior and Informed Consent and the World Bank Group*, 4 SUSTAINABLE DEV. L. & POL'Y 66, 66 (2004). PIC is also referred to as "free, prior informed consent", in order to be absolutely clear that consent must be free and not be given under duress. We consider that essential idea to be inherent in the word "consent" Thus for purposes of this article, we only refer to the term "Prior Informed Consent" (or "PIC") and encompass "free, prior informed consent" within that terminology.

45. *See* United Nations Economic and Social Council (ECOSOC), Inter-Agency Support Group on Indigenous Issues, REPORT ON FREE, PRIOR AND INFORMED CONSENT (May 2004).

46. *See* Fergus MacKay, *Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review*, IV(2) Sust. Dev. Law and Policy, Spec. Issue: Prior Informed Consent: 43-65.

47. L. MEHTA & M. STANKOVITCH, OPERATIONALISATION OF FREE, PRIOR INFORMED CONSENT (2000).

Although PIC is framed and understood in a theoretical and broad manner, explicit discussions and applications of PIC typically arise in more concrete situations. Indeed, like CBPRs, PIC includes essentially local aspects that must be taken into consideration if PIC is to be successful.

The importance of PIC has been highlighted for the process of creating new protected areas, particularly since indigenous peoples and other communities have often lost access to traditionally controlled land and resources as a result of conservation activities.[48] In this context, PIC can serve as a tool for: facilitating more transparent and effective negotiations between communities, conservation groups, and government officials; reconciling local and national interests relating to environmental conservation on indigenous territories; and securing better protection of biological diversity and other resources in protected areas.[49]

The right to PIC has also been acknowledged in the context of access to and benefit sharing of genetic resources under the Convention on Biological Diversity (CBD).[50] PIC is seen as essential to ensure the equitable treatment of "providers" of genetic resources and traditional knowledge as pharmaceutical companies develop products and obtain patents to use them. This was recently highlighted at the CBD 7th Conference of the Parties (COP 7) in Kuala Lumpur, Malaysia in February 2004, during which the Parties to the Convention collectively recognized the need to strengthen the CBD's approach towards the access of indigenous people to genetic resources and benefit sharing.[51]

Also, the World Bank and the International Finance Corporation require "broad community support" for certain projects as part of their Revised Operational Policy and Bank Procedure on Indigenous Peoples, and Policy on Social & Environmental Sustainability, respectively. These policies indicate that "broad community support" from individuals or representatives of the affected communities should be obtained in order for the project to go forward, although it is not yet known what this looks like in practice, or whether it satisfies PIC requirements.[52]

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48. *See* Chapin, supra note 3; TURNBULL, supra note 3; Peter Wilshusen et al., *Contested Nature, Conservation and Development at the Turn of the Twenty-First Century, in* CONTESTED NATURE: PROMOTING INTERNATIONAL BIODIVERSITY WITH SOCIAL JUSTICE IN THE TWENTY-FIRST CENTURY (Peter Wilshusen et al. eds., 2003).

49. *See* PERRAULT, *supra* note 44.

50. Article 8(j) of the CBD requires that "Each Contracting Party shall, as far as possible and as appropriate ... respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities ... and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from [their] utilization. Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818.

51. CBD Conference of the Parties 7, Decision VII/19 E. Access and benefit-sharing as related to genetic resources (Article 15). Measures, including consideration of their feasibility, practicality and costs, to support compliance with prior informed consent of the Contracting Party providing genetic resources and mutually agreed terms on which access was granted in Contracting Parties with users of such resources under their jurisdiction.

52. *See* REVISED OPERATIONAL POLICY AND BANK PROCEDURE ON INDIGENOUS PEOPLES (OP/BP

Finally, the UN Declaration on the Rights of Indigenous Peoples, which was adopted by the UN General Assembly in September 2007 (with a resounding majority of 144 in favor, with 4 opposed and 11 abstentions), strongly endorses the rights of indigenous peoples to PIC. The Declaration has several articles on PIC (which it refers to as "free, prior informed consent;" FPIC), including language that provides that: no relocation shall take place without the FPIC of the indigenous peoples concerned and after agreement on just and fair compensation; no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without FPIC; States shall provide redress with respect to cultural, intellectual, religious and spiritual property taken without their FPIC; States shall obtain FPIC before adopting and implementing legislative or administrative measures that may affect them; and States shall obtain FPIC before approving any project affecting their lands or territories, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[53] Each country that voted against the Declaration (i.e., Australia, Canada, New Zealand, and the United States), cited provisions on FPIC as a major reason for their opposition, raising concerns that these provisions could be understood as a right of veto over the decisions of a democratic legislature.[54]

Despite some initial efforts and successes at applying PIC, in practice there have also been difficulties in the application of this right. States and businesses have sometimes had difficulty determining who to ask for consent, how to do it (especially in light of cultural differences), how much information is necessary, and what constitutes consent. For example, communities may not have set processes for PIC, or may have procedures that are not clear, transparent or broadly representative. Also, different people within a community may have different or incompatible interests and expectations for a proposed project. Dialogue between communities and outside interests may also be impeded by language, cultural barriers, or distrust. Finally, those seeking access to community land or resources may believe that PIC procedures are unnecessary, or too costly or time-consuming, and thus may resist or engage only minimally in the process.

These difficulties are tractable, but in order to achieve PIC effectively, they must be addressed in specific situations, including drawing from best practices and building capacities of stakeholders involved in the dialogue. [55] It is also extremely valuable to support enabling conditions at the local, State, international and project levels, as is touched upon below.[56]

4.10) (World Bank, July 2005); *see also* POLICY ON SOCIAL & ENVIRONMENTAL SUSTAINABILITY at paras. 19-20 (Int'l Fin. Corp., 2006).

53. United Nations Declaration on the Rights of Indigenous Peoples, arts. 10, 11, 19, 28, 29, 32, G.A. Res. 61/295, Annex, U.N. Doc. A/Res/61/295 (Sept. 13, 2007).

54. U.N GAOR, 61st Sess., 107th plen. mtg. at 11-15, U.N. Doc. A/61/PV.107 (Sept. 13, 2007).

55. *See* SARAH LAIRD, BIODIVERSITY AND TRADITIONAL KNOWLEDGE: EQUITABLE PARTNERSHIPS IN PRACTICE (2001); *World Commission on Dams Guidelines, in* WORLD COMMISSION ON DAMS, DAMS AND DEVELOPMENT, A NEW FRAMEWORK FOR DECISION (2000); L. Mehta and M. Stankovitch, *Operationalisation of Free Prior Informed Consent, in* WORLD COMMISSION ON DAMS, DAMS AND DEVELOPMENT, A NEW FRAMEWORK FOR DECISION (2000).

56. See PERRAULT, *supra* note 44.

A first key enabling condition at the community level is to have a clear understanding, and if possible, legal recognition of property rights, including CBPRs. This provides greater certainty and incentives for those proposing projects and for the potentially affected local communities. Strengthening of communities can also include: community mapping of ancestral territories; identifying community needs and priorities regarding management of land and other natural resources; identifying criteria and procedures to guide efforts to obtain PIC; and building technical and legal capacity to engage fully in PIC processes.

A second set of enabling conditions relates to State efforts to develop mechanisms and requirements for PIC, including enacting legislation, rules and policies that support this right, as well as establishing or strengthening institutions to facilitate PIC. Mechanisms and policies should incorporate concerns, criteria and procedures identified by local communities, and should facilitate an understanding of and capacity to implement appropriate processes for attempting to obtain PIC. In addition to the strengthening of laws, institutions and policies, the State can also better enable PIC by supporting capacity-building efforts of local communities, assisting with mapping efforts, and recognizing property rights of local communities.

On the international level, the existence of fair and impartial dispute resolution and enforcement mechanisms that fully recognize the PIC rights of local communities is critical. Much remains to be done in this regard, although some mechanisms currently exist. The World Bank Inspection Panel is available, for example, to examine whether the Bank's "broad community support" criteria was met in a particular project.

Project-level enabling factors relate largely to when and how communities should be involved in decision-making processes and how they relate to other actors. Project cycles will, of course, vary, but generally a project cycle includes the following components: project identification, project preparation and appraisal, project implementation, project monitoring, and project expansion or temporal extension (if either is proposed).

The project identification stage usually involves identification of various prospective sites and includes a summary of the proposed project, which is used to identify subsequent project requirements. For purposes of enabling PIC, it is critical that local communities potentially impacted by a project are identified at this stage and processes are established with their input for facilitating their participation. The project preparation and appraisal stage involves, at a minimum, the following tasks: defining project objectives; identifying key issues; assessing baseline conditions; developing options; assessing environmental and social impacts and feasibility; and selecting options.

Enabling successful PIC requires meaningful engagement with potentially affected local communities on each of these tasks. Project implementation should be consistent with and conform to prior agreements with local communities, and should involve communities to the extent the option chosen reflects such involvement. Project monitoring, among other things, should review and if necessary ensure - that the rights and interests of communities (as reflected in law,

custom, and written agreements) are being respected and supported. Finally, any proposals to expand the scope of the project or extend the time of a project should also include PIC throughout.

At each stage of the project cycle, the implementation of PIC should consider the specific cultural contexts of the project. For example, a person seeking access should obtain consent from every affected community in the traditionally recognized manner, i.e., according to the customary laws and practices of the concerned community. Also, information should be provided to local communities in culturally appropriate ways, e.g., by both written and oral presentations and in local languages understood by potentially affected communities. Another key point about PIC implementation is that discussions should be inclusive so that all affected people have opportunities to participate actively. Consent should be part of all ongoing processes conducted throughout the project cycle.

In summary, putting PIC into operation involves strengthening international regimes for recognition of this right, strengthening domestic laws and policies by establishing mechanisms to facilitate PIC, and carrying out PIC in culturally sensitive ways at all stages of the project cycle, from project identification through monitoring and project adjustments. Recognizing CBPRs is also useful in the realization of community rights to PIC since it clarifies territorial boundaries and reinforces the rights of local communities to the property and resources traditionally held by them.

IV. RECOGNITION OF CBPRS AND PIC: TWO EXAMPLES

The rights of communities to PIC are related to CBPRs in several important ways. At the most basic level, both concepts recognize the rights of local communities to procedural guarantees that ensure their participation in decisions that would affect them. Both PIC and CBPRs also incorporate more substantive rights, especially the ability of communities to stop projects that would unjustly or arbitrarily expropriate their property rights or natural resources. Both CBPRs and PIC also possess essential local characteristics.

There are also key differences: the application of PIC is carried out in response to proposals for new projects that would occur in or impact a community area, and is more focused on a process of dialogue, compared to the acknowledgement of CBPRs which involve State recognition of community property or resource management.

These rights are gaining increasing recognition by national legislatures and in international hard and soft law instruments, especially in regard to indigenous peoples. Below are two examples of official recognition of these rights.

The government of the Philippines' acknowledgement of CBPRs and PIC is a good example, specifically in regards to its passage and initial efforts towards the implementation of the Indigenous Peoples Rights Act (IPRA) of 1997.[57] This law

57. An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefore, and for Other Purposes, Rep.

recognizes the right of indigenous peoples in and to their ancestral domains, as well as their rights to cultural integrity. IPRA provides for private, communal ownership of ancestral domains and sustainable traditional resource rights for indigenous groups, including portions of the physical and spiritual environment used by them for their subsistence, such as fishing and hunting grounds.[58] IPRA details rights to ancestral domain that include: right of ownership, right to develop lands and natural resources, right to regulate entry of migrants, right to safe and clean air and water, and rights in the case of displacement (such as from natural catastrophes).[59]

IPRA also includes explicit rights of indigenous groups to PIC, which it defines as the "consensus of all members of the [indigenous cultural communities/indigenous peoples] to be determined with their respective customary laws and practices, free from any external manipulation, interference or coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community."[60] Having the right to PIC has meant that communities can deny projects or programs that may affect the community financially, economically or culturally, and can stop or suspend any project that has not satisfied the requirements of PIC.[61]

In the last 10 years since the passage of IPRA, and despite many challenges, implementation has been slow and steady. A National Commission on Indigenous Peoples has been created to carry out the policies enshrined in the law, which has approved 29 Certificates of Ancestral Domain Title and 48 Certificates of Ancestral Land Title[62] and has approved 23 Certificates of Compliance to the PIC process that certify that the community has given its consent.[63] IPRA is a good example of the legal recognition that a State can carry out to protect the social, economic and cultural rights of a subset of the long-established communities in the country, as well as to prevent the potential human rights violations that can occur

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Act 8371, 94:13 O.G. 276-2295, (March 20, 1998) (Phil.), *available at* http://www.ncip.gov.ph/downloads/philippines-ipra-1999-en.pdf [hereinafter *IPRA*].

58. Grizelda Mayo-Anda, Loreto L.Cagatulla, and Antonio G. M. La Vina, *Is the Concept of 'Free and Prior Informed Consent' Effective as a Legal and Governance Tool to Ensure Equity among Indigenous Peoples? A Case Study on the Experience of the Tagbanua on Free Prior Informed Consent, Coron Island, Palawan, Philippines* (2006) (unpublished paper presented at "Survival of the Commons: Mounting Challenges and New Realities," the Eleventh Conference of the International Association for the Study of Common Property, Bali, Indonesia, June 19-23, 2006). Paper also adapted for a book: SHARING NATURAL WEALTH FOR DEVELOPMENT: CASE STUDIES FRO PALAWAN PROVINCE, PHILIPPINES (forthcoming).

59. *IPRA*, *supra* note 57, at § 7.

60. *Id.* at § 3(g).

61. *See id.* at § 59. *See also* National Commission on Indigenous Peoples (NCIP) Administrative Order No. 3, Series of 1998 (setting guidelines for the issuance of NCIP certifications that are required for applications to lease, permit, license, contract and other forms of concession in ancestral domains, and which are only issued with the free and prior informed consent of the indigenous peoples concerned).

62. NATIONAL COMMISSION ON INDIGENOUS PEOPLES, ACCOMPLISHMENTS REPORT CY 2004, at 2-3.

63. *Id.* at 24.

when development projects are undertaken in the ancestral domains of communities without the legal guarantee of PIC.

A second example of the legal recognition of CBPRs and PIC is in the Inter-American Court of Human Rights' decision of Moiwana Village v. Suriname. In this case, the Court found that communities, including those that are not indigenous to a given area, but have established significant physical, spiritual, and cultural ties to the land, have rights to property and to PIC.[64] The Court noted that the Moiwana community members, a N'djuka tribal people:

> possess an 'all-encompassing relationship' to their traditional lands, and their concept of ownership regarding that territory is not centered on the individual, but rather on the community as a whole. Thus... their traditional occupancy of Moiwana Village and its surrounding lands – which has been recognized and respected by neighboring N'djuka clans and indigenous communities over the years... should suffice to obtain State recognition of their ownership.[65]

The Court also explicitly recognized the rights of the community to PIC by finding that Suriname must take legislative, administrative, and other measures necessary to ensure the human rights and property rights of the community "with the participation and informed consent of the victims as expressed through their representatives, the members of the other Cottica N'djuka villages and the neighboring indigenous communities."[66] Furthermore, the court ruled that:

> [u]ntil the Moiwana community members' right to property with respect to their traditional territories is secured, Suriname shall refrain from actions – either of State agents or third parties acting with State acquiescence or tolerance – that would affect the existence, value, use or enjoyment of the property located in the geographical area where the Moiwana community members traditionally lived....[67]

In the findings of the Court, CBPRs, or at least the rights of a long-established community to ownership of traditionally occupied lands, as well as the right to PIC are explicitly recognized, paving the way for substantive action by the State.

Although just two examples, these situations demonstrate how governments and regional courts can and have already begun to recognize formally CBPRs and PIC.

V. CONCLUSION

While there remains much to do to ensure that CBPRs are recognized and the right to PIC is achieved, there is a growing array of experience in bringing each of these approaches to life. PIC, in particular, is gaining increasing recognition in

64. Moiwana Village v. Suriname, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, at 54-55 (June 15, 2005).

65. *Id.*

66. *Id.* at 81.

67. *Id.* at 81-82.

international hard and soft law instruments, both by international finance institutions and private sectors across the globe and through national legislation. It is critically important that efforts continue and become more effective with respect to both CBPRs and PIC. Continuing these efforts supports and protects the human rights of local communities and betters the conditions of an important but increasingly vulnerable segment of the world's population. Finally, societies that take part in CBPRs and PICs will benefit as a whole, because these human rights concepts will increase the stability and legitimacy of the countries' governing structures in light of the State's willingness to protect the human rights of indigenous and other local communities.

DOES THE EVOLUTION OF INTERNATIONAL CRIMINAL LAW END WITH THE ICC? THE "ROAMING ICC": A MODEL INTERNATIONAL CRIMINAL COURT FOR A STATE-CENTRIC WORLD OF INTERNATIONAL LAW

Christopher "Kip" Hale[*]

"If women, children, and old people would be murdered a hundred miles from here ... wouldn't you run to help? Then why do you stop this decision of your heart when the distance is 3,000 miles instead of a hundred?" Raphael Lemkin[1]

I. INTRODUCTION

Getting the world to agree on any issue of global importance is an extremely arduous task.[2] Almost all international agreements require years of negotiations,

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[*] Managing Editor, 2006-2007, Denver Journal of International Law and Policy. A previous draft of this Note placed in the 40th Leonard v.B. Sutton International Law Writing Contest. I thank the Denver Journal of International Law and Policy for giving me the chance to publish an extension of this Note and for accepting this Note for publication. I profusely thank Professor Ved Nanda not only for his help with this particular paper, but for being the inspiration that spurred me to the field of international law. Lastly, but not least, I also thank those that helped me in the editing of this rather large Note. Your help is much appreciated.

1. SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 26-7 (Harper Perennial ed., 2003) (2002). Raphael Lemkin was a fascinating person and an even more fascinating story that should inspire anyone who works in any area of international criminal law to work even harder for the advancement of the field. Lemkin's story starts as a young Jewish lawyer who used his academic credentials to escape Nazi controlled Poland. He ended up in the U.S.A, where he spearheaded efforts to bring attention to the atrocities being committed by Nazis, which at the time where relatively unknown to the world. This quote comes from a speech he gave in North Carolina while touring the U.S.A. trying to drum up support for U.S. military intervention against Germany—before the U.S. entered the World War Two— in order to stop the Nazi concentration camps. Lemkin invented the crime of and coined the term "genocide". After World War Two, he worked tirelessly to persuade Nuremberg Tribunal officials to recognize "genocide" in any way, shape, or form. Then, Lemkin set out on a crusade to make genocide an international crime by working without sleep or distraction during the negotiations of the Genocide Convention, becoming an absolute pest to international diplomats, constantly pleading with them to form a formidable genocide treaty. After the signing of the Genocide Convention, Lemkin went almost directly to work, trying to persuade the U.S. Senate to ratify the treaty. Tragically, but most unsurprisingly, Lemkin died of a heart attack in 1959 while waiting in a public relation's office, waiting to lobby for the ratification of the Genocide Convention almost 11 years after the U.S.A. signed the treaty. *See id.* at 17-78.

2. *See e.g.*, Alison Purdy, *The Kyoto Protocol*, Guardian, Feb. 16, 2005, *at* http://www.guardian.co.uk/climatechange/story/0,12374,1415660,00.html; Fact Sheet, *infra* note 334 (exhibiting an example of the world's inability to agree on important world issues).

thousands of miles traveled, hundreds of hours drafting, not to mention the money needed to bring about these agreements. Taking into consideration the laborious and costly nature of international relations in tandem with the divergent positions of many States on international criminal law, the 1998 Rome Statute of the International Criminal Court (Rome Statute) that established the International Criminal Court (ICC) must be viewed as a tireless, monumental success.[3] Despite the United States' (U.S.) ongoing unwillingness to partake in the ICC,[4] it cannot be ignored that the time, effort, and money that went into fashioning the Rome Statute resulted in 104 nations becoming ICC State Parties.[5] As a result, the ICC is currently functional, and most importantly, already adjudicating alleged international criminals.[6] However, the ICC has the lofty goal of ending international impunity,[7] and it is only natural to question if the ICC is sufficiently capable of achieving such a gargantuan feat?

For any international criminal system to pledge that all future international criminals will receive punishment, the most basic requirement that such an international criminal system must fulfill is the guarantee that not one criminal will find State sanctuary from prosecution anywhere in the world. Accordingly, only an international criminal enforcement mechanism backed by all nations could make such a guarantee, because an international criminal only needs one safe haven to escape justice. The ICC falls well short of obtaining full international support considering that some of the most powerful countries—U.S., Israel, Russia, China, and India—are not State Parties to the ICC. At present, the lack of full worldwide support significantly reduces the likelihood that ICC can deliver on its mandate, particularly its goal of catching and punishing all international criminals.

From this shortcoming of the ICC, it becomes evident that a true international criminal system demands the inclusion and participation of every sovereign State. An international criminal enforcement mechanism without an all-inclusive global identity cannot solve a dilemma that rises to the level of international crime. Far from being simply a semantic critique, any and all legitimate goals of an international criminal system, be it international peace and security, deterrence of international crime, or the end of international impunity, cannot be realized with only partial cooperation, because an international criminal system short of full universal support lacks the integrity and reliability necessary to fulfill its purpose.[8]

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3. *See* Rome Statute of the ICC, *infra* note 207. The Rome Statute established the ICC, but the Rome Statute did not enter into force, and thus create a working ICC, until the 60th country became a State Party, which occurred on July 1, 2002. International Criminal Court, *Establishment of the Court*, http://www.icc-cpi.int/about/ataglance/establishment.html.

4. *See* Fact Sheet, *infra* note 334 (exemplifying the U.S. opposition to the ICC).

5. *Establishment of the Court*, *supra* note 3.

6. *See* International Criminal Court, *Situations and Cases*, http://www.icc-cpi.int/cases.html.

7. United Nations, *Establishment of an International Criminal Court*, http://www.un.org/law/icc/general/overview.htm.

8. A domestic analogy of this critique would be if there were laws against murder in only 38 U.S. states. Such a gap in criminal coverage would illegitimize the U.S. criminal system and would cast doubt on the U.S.' desire and willingness to punish murderers. Of course, the response to this critique would be that unlike domestic law, this is the nature of international law, for any international legal

Therefore, anything less than the membership of every single nation cannot rationally be deemed an adequate *international* criminal enforcement mechanism. Otherwise, the world is left with an international criminal system, like the ICC, riddled with holes from which international crime thrives.

The purpose of this Note is to propose a theoretically different international criminal tribunal, one with the potential to bring about full worldwide participation. This Note's proposed international criminal system, called the "Roaming International Criminal Court" (Roaming ICC), brings together the three elements necessary to create a *truly international* criminal system: reality of the Westphalian State-centric system of international law,[9] the philosophic and legal beliefs of the opponents of the current ICC, and the philosophic and legal beliefs of the proponents of the current ICC. The result is a plausible international criminal system that will be the best equipped to face the challenges of prescribing, adjudicating, and enforcing international criminal law in all instances.[10]

This Note will methodically trace the evolution of international criminal law, starting in Part II with an analysis and critique of universal jurisdiction. Considered the backbone of international criminal law, universal jurisdiction weaves in and out of all subjects in international criminal law. The purpose of Part II will be to define universal jurisdiction and its many forms, compare and distinguish universal jurisdiction from other areas of this Note, and finally conclude that universal jurisdiction practiced by individual States or international tribunals cannot represent an effective international criminal system.

Part III will focus on the most notable international criminal tribunals of modern era: the International Military Tribunal at Nuremberg (Nuremberg), the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the

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mechanism—be it international environmental law, international maritime law, or international trade law—does not enjoy complete universal support. However, international criminal law differs from all other types of international law, because international criminal law deals with the base, the unrighteous, and the evil. There is a reason why the practice of law is often divided between criminal law and everything else. Accordingly, the fight against the commission of international crimes requires the world's undivided support at a minimum.

9. The terms "Westphalia" and "State-centric" should be considered interchangeable when used in this Note. Moreover, variations on these terms will be used in this Note liberally, such as Westphalian world order, Westphalian State-centric world of international law, State-centric world order, Westphalian order of international law. More or less, all of these terms refer to the same idea. Specifically, Westphalia refers to the treaties that ended the Thirty Years War (1618-1648), commonly known in their collective form as the Peace of Westphalia. *See* Treaty of Peace of Münster, Fr.-Holy Roman Empire, Oct. 24, 1648, 1 Parry 271; Treaty of Osnabrück, Swed.-Holy Roman Empire, Oct 24, 1648, 1 Parry 119. "[B]oth law and society looked different after the Peace of Westphalia established the modern secular state and the society of such states [a]n international (inter-state) system assumes a conception and a definition of a state; the Peace of Westphalia (1648) confirmed that conception." DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 2-3 (4th ed. 2001). The social, political, and legal power infrastructure of the world has State-centric since Westphalia; thus, this State dominance of world power has been labeled the Westphalian world order.

10. *See* O'Keefe, *infra* note 14, at 747 n.50 (citing the multitude of humanitarian conventions, which is evidence that the world community is capable of agreeing on important world issues, a capability that must be used to create the Roaming ICC).

International Criminal Tribunal for Rwanda (ICTR). A quick overview of the precedent set down by Nuremberg will help shed light on the analysis, both factual and legal, of the ICTY and ICTR. International criminal law, by its very nature, adjudicates the worst human behavior imaginable. Therefore, the sections devoted to the ICTY and ICTR thoroughly examines the underlying conflicts and the facts that led to the creation of these two *ad hoc* tribunals as a reminder of the very reasons why the world must have a fully functioning, fully backed international criminal system. Part III will conclude that *ad hoc* tribunals, while necessary for the former Yugoslavia and Rwanda conflicts, are not viable international criminal enforcement mechanisms for the world at large.

Part IV will detail the creation of the ICC, the structure of the ICC, and the benefits of the ICC over its *ad hoc* tribunal predecessors. However, is the evolution of international criminal law supposed to end with the ICC? Part V will answer this question in the negative, primarily because the current ICC is contrary to the reality of a State-centric world of international law. The Westphalian system of State domination over the international legal order, while certainly challenged and altered in recent years, is not in jeopardy of radical change or of future demise. An effective international criminal system must embrace the State-centric reality of international law, in that it must be tailored to work in our State-centric world. In promoting such a philosophical change in the international community's approach to creating an international criminal system, Part V will introduce the Roaming ICC and explain its benefits. As will be demonstrated, the central appeal of the Roaming ICC is that it incorporates every single nation, appeases both sides of the current ICC debate, and brings about an effective international criminal enforcement mechanism to punish those that perpetrate the worst of human behavior.[11]

II. UNIVERSAL JURISDICTION: ANALYSIS OF THE CONTROVERSIAL JURISDICTION PRINCIPLE

The concept "universal jurisdiction" does not have a consistent definition, which is a revealing sign of its limitations. As cited in a recent International Court of Justice (ICJ) opinion, "[t]here is no generally accepted definition of universal jurisdiction in conventional or customary international law"[12] However, for this

11. Just as important as it is to discuss what this Note is about, it is just as important to discuss what it is not about. The focus of this Note is not jurisprudential, in that the legality or illegality of specific international criminal laws will not be discussed. Rather, this Note will instead focus on philosophical legal ideas, particularly pertaining to jurisdictional issues associated with international criminal law.

12. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v Belg.), 2002 I.C.J 3, 165 (Feb. 14) (dissenting opinion of Judge Van den Wyngaert), *available at* http://www.icj-cij.org/docket/files/121/8144.pdf [hereinafter Arrest Warrant]. For point of reference, customary international law should be defined and differentiated from conventional international law. Customary international law, historically and presently, is the centerpiece of international law. CARTER ET. AL, *infra* note 385, at 120-121. Customary international law along with international conventions/treaties and principles of law accepted by the world's legal systems are the sources of international law recognized by the ICJ. Statute of the International Court of Justice art. 38(1), June 26, 1945, *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0. Considering that there is not an

Note's purposes, universal jurisdiction is a principle of law that enables and/or requires a State to exercise jurisdiction over specific crimes without a connection between the offense, offender, or victim and the State exercising jurisdiction.[13] In the hierarchy of legal principles in international law used to justify the jurisdiction of a State to act, the universal jurisdiction principle is often used only in the absence of any other legitimate option.[14] Whereas other international legal principles ground jurisdiction in a nexus between the actor, victim, place, or state interest with the exercising state, universal jurisdiction is void of such a nexus.[15] Instead, universal jurisdiction focuses on the nature of the crime, in that the crime is so repulsive and threatening to international security[16] that the mere occurrence

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international legislative body that enacts laws for the world, it is an academic and legal pursuit to identify international law. Convention/treaty law is relatively easy to identify, because it is written down in a legal instrument. Customary international law is a far harder item to identify. The generally accepted elements of customary international law—and the elements used to identify customary international law—are state practice (objective element) and *opinio juris* (subjective element). North Sea Continental Shelf (F.R.G. v. Neth.), 1969 I.C.J. 3, 41-45 (Feb. 20), *available at* http://www.icj-cij.org/docket/files/52/5561.pdf; CASSESE, *infra* note 59, at 156-60; CARTER ET. AL, *infra* note 385, at 124-25; International Law Association, Committee on Formation of Customary (General) International Law, *Final Report on the Committee Statement of Principles Applicable to the Formation of General Customary International Law* 8 (2000), *available at* http://www.ila-hq.org/pdf/CustomaryLaw.pdf [hereinafter CIL Report]. The Restatement on Foreign Relations best summarized how customary international law is formed when it simply stated that "[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation (*opinio juris*)." Restatement of the Law (Third) Foreign Relations Law of the United States § 102 (2) (1987) (alteration added) [hereinafter RST Foreign Relations]. "State practice" can include diplomatic relations between States, international acts or inactions of States, internal practices of State, decision by State tribunals, decisions by international or regional tribunals, practice of international organs, treaties, juristic writings, etc., but state practice need not be perfectly uniform or include absolute consent of all nations to be bound in order for a customary international law to form. RST Foreign Relations, *supra* note 12, § 102 cmt. b; CASSESE, *infra* note 59, at 162 ; CARTER ET. AL, *infra* note 385, at 121-22. Depending on the subject matter of a proposed customary international law, state practice must be practiced over a sufficient duration of time, uniformly and consistently applied, and generally practiced worldwide. GURUSWAMY ET AL., *International Environmental Law and World Order* 102-04 (1999). Finally, customary international law can develop out of a convention or treaty, and a convention or treaty could be a codification of an already existing customary international law or crystalization of a potential customary international law. CASSESE, *infra* note 59, at 167-69; CARTER ET. AL, *infra* note 385, at 127-28.

13. Universal jurisdiction has been defined in many ways. *E.g.*, International Law Association, Committee on International Human Rights Law and Practice, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses*, 2-3 (2000), http://www.ila-hq.org/pdf/Human%20Rights%20Law/HumanRig.pdf; Gabriel Bottini, *Universal Jurisdiction After the Creation of the International Criminal Court*, 36 N.Y.U. J. INT'L & POL. 503, 510 (2004) (defining universal jurisdiction).

14. *See* Bruce Broomhall, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 NEW ENG. L. REV. 399, 400 (2001); Roger O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concepts*, 2 J. INT'L CRIM. JUST. 735, 744 (2004).

15. *See* Bottini, *supra* note 13, at 511-12; Broomhall, *supra* note 14, at 400; O'Keefe, *supra* note 14, at 745-46. (explaining the differences between universal jurisdiction and other jurisdictional principles).

16. Not any crime is subject to universal jurisdiction, but only a limited amount of criminal conduct determined to be of such a degree that the commission of the criminal conduct itself translate into a right of a State to act or use universal jurisdiction, if need be. *See* BROOMHALL, *infra* note 59, at

of the criminal act justifies legal response by any State or appropriate international organization.[17] Despite being devoid of a traditional nexus, the legitimacy of universal jurisdiction itself is not questioned, as the principle of universal jurisdiction is a customary international law.[18]

"... [T]he term 'universal jurisdiction' is shorthand for 'universal jurisdiction to prescribe' or 'universal prescriptive jurisdiction'..."[19] This definition highlights an essential aspect of universal jurisdiction worth noting. When jurists and other international legal commentators commonly used the term "universal jurisdiction", it is in reference to the universal jurisdiction to prescribe, not to enforce.[20] For example: universal jurisdiction, absent other jurisdictional principles, means that a State *prescribes* genocide committed by a foreign tyrant in another State, against foreign persons, and not in conflict with the prescribing State's national interests - as a violation of their domestic law, conventional international law, and/or customary international law-,but the State cannot *enforce* their domestic genocide law and/or any type of international law prohibiting genocide unless the tyrant comes within the State's territory or the State decides to try the tyrant *in absentia*.[21]

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17. Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction* 28 (2001), http://lapa.princeton.edu/hosteddocs/unive_jur.pdf [hereinafter Princeton Principles] (showing that the focus of universal jurisdiction is on the nature of the crime committed). In addition to determining that universal jurisdiction is justified due to the nature of the criminal conduct, international legal scholarship also adds that the need for a forum to adjudicate these heinous international crimes and the consensus among States—gauged by customary or conventional international law— regarding the reprehensibility of such criminal conduct also justifies the use of universal jurisdiction. *Final Report on the Exercise of Universal Jurisdiction in Respect to Gross Human Rights Offenses*, *supra* note 13, at 2-3; Monica Hans, Comment, *Providing for Uniformity in the Exercise of Universal Jurisdiction: Can Either the Princeton Principles on Universal Jurisdiction or an International Criminal Court Accomplish this Goal?*, 15 TRANSNAT'L LAW. 357, 360, 392-93 (2002); Sriram, *infra* note 18, at 305, 375, 377; *see* Menno T. Kamminga, *Universal Civil Jurisdiction: Is it Legal? Is it Desirable?*, 99 AM. SOC'Y INT'L L. PROC. 123 (2005) (explaining that a justification for universal civil jurisdiction is that the "unlawful conduct is a matter of international concern.").

18. Princeton Principles, *supra* note 17, at 29 (stating that a judicial body of any State may exercise universal jurisdiction in connection with serious crimes under international law such as piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture); Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337, 346-47 (2001); Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT'L L. REV. 301, 314 (2003).

19. O'Keefe, *supra* note 14, at 745.

20. *Id.* at 750 ("The fact is that prescription is logically independent of enforcement. On the one hand, there is universal jurisdiction, a head of prescriptive jurisdiction alongside territoriality, nationality, passive personality and so on. On the other hand, there is enforcement in absentia, just as there is enforcement *in personam*. In turn, since prescription is logically distinct from enforcement, the legality of the latter can in no way affect the legality of the former, at least as a matter of reason."); *see* Sriram, *supra* note 18, at 316 ("In essence, under universal jurisdiction, a state is competent to judge an accused alleged to have committed certain international crimes and found in its territory"). Later on in this Note, there will be a discussion on jurisdiction to adjudicate, which will add another layer of jurisdictional analysis to this discussion. *See infra* section IV, 3.

21. Broomhall, *supra* note 14, at 400; O'Keefe, *supra* note 14, at 750. This example is an oversimplification of "prescribe", because every country "prescribes" differently. Prescribe could

Turning now to application, the practice of universal jurisdiction, as defined by international legal scholars, is bifurcated into permissive and mandatory forms.[22] The distinction between permissive and mandatory universal jurisdiction hinges on whether a State exercises universal jurisdiction from a customary or conventional international law obligation.[23] As the adjectives connotate, the difference between the practice of mandatory and permissive universal jurisdiction is the degree of obligation imposed on States. Permissive universal jurisdiction occurs when a State has the option to exercise universal jurisdiction under the guise of a customary international law violation, and the State *may* enact domestic legislation that conforms to customary international law. [24] Permissive universal

include legislative and/or judicial action by a State, depending on if the State already has domestic legislation against, for example, war crimes that comports with customary or conventional international law prohibiting war crimes. Jurisdiction to adjudicate, while an important issue in this discussion on universal jurisdiction, is not addressed in this Note's section on universal jurisdiction, because jurisdiction to adjudicate "generally follows jurisdiction to prescribe", in that if a State prescribes genocide, it follows that the State can adjudicate genocide violators. SADAT, *infra* note 200, at 112-119 (discussing jurisdiction to adjudicate in the context of universal jurisdiction, international criminal law, and domestic States). *See infra* section IV, 3. Additionally, the example used does not include a situation where a State's authorities enter another State to enforce its own laws that the invading State has prescribed as internationally criminal. A State going to such ends to enforce its laws extraterritorially, however, is very unlikely in world affairs.

22. Broomhall, *supra* note 14, at 401-405; *see* Bottini, *supra* note 13, at 516-521 (describing the interplay between universal jurisdiction pursuant to customary and pursuant to conventional international law). It should be noted that traditionally, universal jurisdiction is not split up into these two forms, but rather, universal jurisdiction is historically thought only to be permissive. Johan D. van der Vyver, *Personal and Territorial Jurisdiction of the International Criminal Court*, 14 EMORY, INT'L L. REV. 1, 72 (2000). However, Prof. Broomhall introduced the bifurcation of universal jurisdiction into permissive and mandatory forms, highlighting the different impacts that customary and conventional law have on the practice of universal jurisdiction. Some even argue that under customary international law, universal jurisdiction is mandatory now, "[f]rom this perspective, universal jurisdiction flows directly from the fact that the core crimes of international criminal law rest on norms of *jus cogens* that give rise to obligations *erga omnes*." Broomhall, *supra* note 14, at 405; M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 64 (1996).

23. Broomhall, *supra* note 14, at 401. ("In ordinary usage, 'universal jurisdiction' encompasses both permissive and mandatory forms, where a state may and where a state must exercise jurisdiction. This largely parallels the distinction between the doctrine's manifestations under customary and under conventional international law"). Although his terminology is different and his analysis of universal jurisdiction possesses more nuances, Prof. Summers makes similar discussion about "conventional universal jurisdiction" stemming from conventional international law and "customary universal jurisdiction" coming from customary international law. *See* Mark A. Summers, *The International Court of Justice's Decision in Congo v. Belgium: How has it Affected the Development of a Principle of Universal Jurisdiction that Would Obligate All States to Prosecute War Criminals?*, 21 B. U. INT'L L. J. 63, 73-88 (2003).

24. Broomhall, *supra* note 14, at 400-01, 404-05; Hans, *supra* note 17, at 362. A State acting under permissive universal jurisdiction, or said differently, acting under a customary international law obligation, is not required to enact domestic legislation at all in order to ground jurisdiction for the violation of a customary international law. The State or non-State actor can simply ground jurisdiction over a defendant for violating customary international law without every having any domestic legislation on point, theoretically speaking. *See, e.g.*, Loi modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire et l'article 144 ter du Code judiciaire,

jurisdiction is attractive in some respect, because it justifies a State in grounding universal jurisdiction over a defendant for violations of customary international law, or international law that the entire world is obligated to abide by and uphold,[25] regardless of a complete consensus of States.[26] Yet, without a defined entity consistently acting as the announcer and enforcer of customary international laws, the murky contours of this type of international law discourages States from enforcing such laws.[27] Also, States can simply ignore customary international law obligations with little to no repercussions[28] given that States have the discretion not to use universal jurisdiction to prosecute a customary international law violation.[29]

Alternatively, mandatory universal jurisdiction occurs when a State must exercise universal jurisdiction under its conventional international law obligations—which are obligations beset from conventions or treaties—and such a State *must* enact domestic legislation that conforms to the conventional international law that it has ratified.[30] Commonly, a requirement to practice

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Apr. 23, 2003, M.B., May 7, 2003 *translated in* 42 I.L.M 749 (2003); *see* Steve R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 889 (2003). However, due to the desire for jurisdictional clarity, some States prefer or require that domestic legislation effectuating a customary international law is enacted, and jurisdiction over the defendant is grounded in both the domestic law and the customary international law. As will be discussed in the paragraph below devoted to traditional application of universal jurisdiction, Prof. Sriram accentuates this point by focusing on the diversity of laws that domestic courts rely on when exercising universal jurisdiction, and classifying States into two categories accordingly. Prof. Sriram calls one "pure universal jurisdiction" and the other "universal jurisdiction plus". Some States simply ground jurisdiction for the violation of customary or conventional international law—assuming the conventional international law at issue is self-executing and/or the country does not require domestic legislation in the ratification process of a convention/treaty—and simply do not rely on domestic legislation on point, if it exists at all. Other States will ground jurisdiction over an individual for a violation of customary or conventional international law *and* for a violation of some domestic legislation on point. *See* Sriram, *supra* note 18, at 306-311, 358-361.

25. It must be remembered that customary and conventional international law can play off each other, with one helping creating the other and vice versa. *See* Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 98 (Oct. 2, 1995), *available at* http://www.un.org/icty/tadic/appeal/decision-e/51002.htm; Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 113-14 (June 27); *supra* note 12.

26. BROOMHALL, *infra* note 59, at 110; Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 LAW & CONTEMP. PROBS. 41, 52-59 (1996). This does not consider the persistent objector rule, which theorizes that States that consistently express their opposition to and act in opposition to a potential customary international law are not bound by that custom if it were to become recognized sufficiently as a customary international law by the international community. However, the persuasiveness and authority behind the persistent objector rule is not clear or supported adequately. CARTER ET. AL, *infra* note 385, at 124; CASSESE, *infra* note 59, at 162-63.

27. METTRRAUX, *infra* note 113, at 14-18.

28. *See, e.g.*, In the Dispute Between Libyan American Oil Company (LIAMCO) and the Government of the Libyan Arab Republic Relating to Petroleum Concessions 16, 17, and 20, Apr. 12, 1977, 20 I.L.M. 1 (1981) (exemplifying the ability of a sovereign nation to walk away from customary international legal obligations).

29. *See* Broomhall, *supra* note 14, at 401.

30. Broomhall, *supra* note 14, at 401; Hans, *supra* note 17, at 362-63. Again, the requirement to

mandatory universal jurisdiction is included in conventions and treaties through an *aut dedere aut judicare* ("either prosecute or extradite") provision, where a State must prosecute a suspected violator of a conventional international law or extradite the alleged offender to another State Party to the convention/treaty that will prosecute the violation.[31] Furthermore, the same convention or treaty will require the State to enact domestic legislation prohibiting the conduct at issue in the convention or treaty.[32] Notwithstanding the wholly theoretical difference between *aut dedere aut judicare* provisions and pure universal jurisdiction,[33] *aut dedere aut judicare* provisions and the corresponding required domestic legislation exemplifies how conventions and treaties can feasibly bind State parties to abide by and practice universal jurisdiction, just like any contract binds the parties to the terms of the deal. Nevertheless, this oversimplification of the convention and treaty process glosses over the major drawback to mandatory universal jurisdiction, which is the extreme difficulty associated with getting States to obligate themselves, in writing, to practice universal jurisdiction. In addition, a sovereign State agreeing to an *aut dedere aut judicare* provision in a convention or treaty does not unequivocally bind a signatory party to prosecute or extradite, because there is no true central enforcement mechanism to force a sovereign State to fulfill its conventional international law obligations, nor has *aut dedere aut judicare* itself

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enact complying domestic legislation depends on the domestic rules on ratifying that a State Party to a convention or treaty uses. Some states, like Botswana and Slovakia, automatically make every convention or treaty these countries sign enforceable domestic law. *See* Handbook for FCTC Ratification Campaigns, Infact Report (Infact, Boston, MA), at 24, 37, *available at* http://www.stopcorporateabuse.org/files/pdfs/Ratification%20Handbook_English2005.pdf. Other states, like Canada, require domestic legislation in order for a convention or treaty that Canada signed to be ratified and thus enforceable domestically. *See Id.* at 39. A majority of States, like the U.S.A., have hybrid ratification procedures unique to those countries. *See, e.g.,* U.S. CONST. art. II, §2, cl. 2. All of this could be moot if the convention or the treaty itself is self-executing, meaning that a country signing a convention or treaty makes the convention or treaty enforceable law within the signing country. *See* RST Foreign Relations, *supra* note 12, § 111 cmt. h.

31. *See e.g.,* International Convention Against the Taking of Hostages, pmbl, Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 7, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85, *available at* http://www.ohchr.org/english/law/cat.htm (containing typical examples of these prosecute or extradite provisions that are common in international treaties).

32. Broomhall, *supra* note 14, at 401; Hans, *supra* note 17, at 362-63.

33. Arrest Warrant, *supra* note 12, Joint Separate Opinion of Judge Higgins, Kooijmans and Buergenthal, para. 41; Bottini, *supra* note 13, at 516-17; Broomhall, *supra* note 14, at 401. Broomhall emphasizes that mandatory universal jurisdiction "...is not truly 'universal,' but is a regime of jurisdictional rights and obligations arising among a closed set of states' parties...Under customary law, states are (at least in the prevailing view) merely permitted to exercise universal jurisdiction over, for example, piracy on the high seas or crimes against humanity. The phrase 'universal jurisdiction' more accurately describes matters of custom than it does the jurisdiction that arises only *inter partes* through a convention." *Id.* This is a theoretical difference, because in reality, a defendant could, under either mandatory universal jurisdiction or permissive/pure universal jurisdiction, be charged by a foreign State that has no other jurisdictional nexus with the defendant. So, regardless if the defendant is brought before a domestic court pursuant to a customary or conventional international law obligation of said State, the outcome is the same, and the defendant will argue that the domestic court does not have jurisdiction over him/her.

become unequivocal customary international law.[34]

While the permissive/mandatory paradigm helps establish a strong theoretical understanding of universal jurisdiction in application, this Note is primarily concerned with what the empirical evidence of States practicing universal jurisdiction reveals. First, the evidence shows that the lion's share of universal jurisdiction activity, historically and presently, is by individual States acting as pseudo-international legal bodies.[35] It should not come as any surprise that sovereign States, rather than international organizations or international tribunals, practice universal jurisdiction more often considering the historical primacy of the sovereign "State" in international law[36] and that universal jurisdiction was initially formulated for States to use to combat piracy.[37] Therefore, traditionally, States have a monopoly over the practice of universal jurisdiction. Second, the evidence also supports the conclusion that when a State exercises universal jurisdiction, the State will either justify jurisdiction over a defendant solely for violating the State's

34. A sovereign nation, being a sovereign, can choose neither to prosecute nor extradite, unless *aut dedere aut judicare* reaches the level of customary international law. However, "prosecute or extradite" provision have not attained the status of customary international law, and this is the reason why ICTY intervention in former Yugoslavia was somewhat legally objectionable, because the actors in the former Yugoslavia conflict did not violate customary international procedural law, i.e. *aut dedere aut judicare*. Michael J. Kelly, *Cheating Justice By Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists – Passage of Aut Dedere Aut Judicare Into Customary Law & Refusal to Extradite Based on the Death Penalty*, 20 ARIZ. J. INT'L & COMP. L. 491, 497-503 (2003) (offering both sides of the argument that *aut deder aut judicare* itself is not customary international law). Even if *aut dedere aut judicare* did gain customary international law status, this Note has highlighted that customary international law obligations can simply be ignored by a sovereign State.

35. Broomhall, *supra* note 14, at 403 (explaining that universal jurisdiction usually means an individual State prosecuting a suspect on behalf of the international community); *see e.g.*, Fiona McKay, *Universal Jurisdiction in Europe: Criminal Prosecutions in Europe Since 1990 for War Crimes, Crimes against Humanity, Torture and Genocide*, REDRESS TRUST REP., http://www.redress.org/publications/UJEurope.pdf [hereinafter Redress Memo]; Ariana Pearlroth, *Universal Jurisdiction in the Europe Union: Country Studies*, REDRESS TRUST REP., http://www.redress.org/conferences/country%20studies.pdf [hereinafter New Redress Memo]. These two reports exemplify that universal jurisdiction is primarily practiced by sovereign States, because the clear majority of present-day universal jurisdiction cases are undertaken by individual European countries.

36. *See* MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 1 (1982) (stating that "international law is primarily concerned with states"); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 287-88 (2003) (explaining that all things international law stem from the State, because the State is the primary actor in the international arena); Sammons, *infra* note 49, at 114-15.

37. *See* CASSESE, *infra* note 59, at 435-36. It should be stressed that the first evolutionary step in international criminal law was sovereign States applying universal jurisdiction. As the Note progresses, the move away from sovereign States being the only participants in international criminal law will be shown by the introduction of the Nuremberg Tribunal, the ICTY, and the ICTR. In order for these tribunals to practice international criminal law, these tribunals used a combination of universal jurisdiction and the delegation of sovereign authority by the U.N. or international community to do so. The most recent evolutionary step in international criminal law is the ICC, where a combination of universal jurisdiction and explicit State consent via treaty law allows the ICC to practice international criminal law.

own domestic laws even if an international law on point exists,[38] or the State exercises "universal jurisdiction plus", whereby the State justifies jurisdiction over a defendant for violations of both its domestic laws and an international law on point.[39] Extremely rare is the situation where a State uses universal jurisdiction to gain jurisdiction over a defendant in order to apply an international law exclusively,[40] and even rarer, where universal jurisdiction is applied by a non-State actor.[41]

Sovereign States, historically and practically, are the predominant universal jurisdiction participants; however, the international legal community argues extensively whether international tribunals, both old and new, exercise or have exercised universal jurisdiction through the delegation of the power to use universal jurisdiction from sovereign States.[42] Even though the purpose of this Note is not to decide this issue definitively, the concept of "universal jurisdiction" should not be conflated with international tribunals as one in the same.[43] International tribunals practice "international jurisdiction", or delegated authority from the international community to adjudicate international crimes. [44] The

38. S.R. RATNER & J.S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL Law 161 (2nd ed., Oxford University Press, 2001); O'Keefe, *supra* note 14, at 746 (discussing the reality that the practice of universal jurisdiction usually means that a domestic court take jurisdiction over a person without a direct connection to the State (i.e. universal jurisdiction), but does not apply international law, but the State's own domestic law).

39. Sriram, *supra* note 18, at 356, 360 (defining universal jurisdiction plus as "claims about the universal nature of the crime are combined with reliance on ordinary domestic criminal legislation or other principles of extraterritorial jurisdiction... Judges may seek to assert jurisdiction in accord with specific provisions of domestic legislation that provide explicitly for extraterritorial application of criminal legislation, or with domestic legislation incorporating provisions of treaties that provide for such jurisdiction, or with domestic criminal legislation. In some of these cases, judges simultaneously maintain that jurisdiction could be based in addition to, or solely on, universal jurisdiction").

40. *See, e.g.,* Arrest Warrant, *supra* note 12, *available at* http://www.icj-cij.org/docket/files/121/8126.pdf (exhibiting an example of a sovereign state using universal jurisdiction to apply international law within a domestic court).

41. Potential non-State actors would be international tribunals. See next section on *ad hoc* international criminal tribunals for more insight into international entities exercising universal jurisdiction.

42. Bottini, *supra* note 13, at 513-14 (differentiating between universal jurisdiction and international tribunals); Morris, *supra* note 18, at 350-51; Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROBS. 13, 26-30, 35-37 (2001) (arguing that States cannot delegate jurisdiction in regards to third parties, and the delegation of universal jurisdiction to international tribunals is not binding or feasible); *but see* Damir Arnaut, *When in Rome...? The International Criminal Court and Avenues for U.S. Participation*, 43 VA. J. INT'L L. 525, 549-53 (2003) (making persuasive arguments that universal jurisdiction can be delegated to international tribunals, specifically through treaty processes).

43. Bottini, *supra* note 13, at 513-14.

44. *Id.; see infra* note 113; *infra* note 221. The question becomes, where did the international community get the jurisdiction it just delegated to the international tribunal to adjudicate these international crimes? Presumably, it could come from consent of the delegating State(s), or from the UN's delegated authority to enforce international peace and security on behalf of Member States, or from the customary/permissive or mandatory/conventional universal jurisdiction obligation that individual States of the international community have that requires them to adjudicate such criminal conduct. The latter would in fact be a situation where an international tribunal was exercising delegated

possibility, however, that international tribunals could, or do, practice universal jurisdiction should not be discounted.[45] Nonetheless, international tribunals can, do, and have grounded jurisdiction in a multitude of legal jurisdictional principles other than the universal jurisdiction principle.[46] Hence, it is best, conceptually, to perceive universal jurisdiction as a means to an end, and international tribunals as actors, just like States, that are able to use universal jurisdiction.[47]

For all its potential, universal jurisdiction remains an unrealized and underused idea.[48] Some have suggested that the lack of sufficient investigation and academic inquiry into universal jurisdiction is the reason preventing world-wide acceptance and usage of universal jurisdiction.[49] However, the explanation for universal jurisdiction's underutilization may be grounded in mere pragmatism.

The lack of a "link or nexus with the [exercising] forum" makes universal jurisdiction facially undesirable to States.[50] Although universal jurisdiction grounds itself in the moral responsibility of States to apprehend violators of such abhorrent conduct, it simply does not possess enough legal persuasiveness, in comparison to other jurisdictional principles, to enlist States into using universal jurisdiction regularly. For some, universal jurisdiction poses a direct threat to the Westphalian State-centric construct of international law,[51] and practicing universal

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universal jurisdiction. *See* SADAT, *infra* note 200, at 116-117.

45. M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 240 (1999) (stating that "the ICC can exercise universal jurisdiction when a situation is referred to it by the Security Council"); Arnaut, *supra* note 42, at 551-53. Given the fact that the ICTY and ICTR have jurisdiction over genocide, crimes against humanity, and war crimes (more or less equally) and both *ad hoc* tribunals stated that these international crimes do give rise to universal jurisdiction, an argument can be made that the ICTY and ICTR are actually undertaking universal jurisdiction. Prosecutor v. Tadić, *supra* note 25, ¶ 62; Prosecutor v. Ntuyahaga, Case No. ICTR-90-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment, ¶ 1 (Mar. 18, 1999). Not to mention, the ICTY and ICTR are adjudicating violations of international law that occurred in places outside of the tribunals' country of residence, done by foreign people, against foreign people, so by definition, it can be argued that they are exercising universal jurisdiction.

46. *See* Morris, *supra* note 18, at 350 (discussing that international tribunals, specifically the ICC, can ground jurisdiction in universality principle and other legal principles). An example of an international tribunal grounding jurisdiction over an international crime without universal jurisdiction would be the Nuremberg Tribunal, as a majority of scholars argue. *See infra* section III, A. Important to know that in regards to the Roaming ICC proposal of this Note, the Roaming ICC is an international tribunal that would not ground jurisdiction in the universality principle exclusively.

47. In order to understand this entire Note fully and correctly, it is imperative to keep this paragraph in mind when reading the sections devoted to the ICTY and ICTR, the ICC, the Roaming ICC.

48. *See* Leila Nadya Sadat, *Redefining Universal Jurisdiction,* 35 NEW ENG. L. REV. 241, 245 (2001).

49. *See* Anthony Sammons, *The "Under-Theorization" of Universal Jurisdiction: Implication for Legitimacy on Trials of War Criminals by National Courts*, 21 BERKELEY J. INT'L L. 111, 113-14 (2003) (stating that the "incomplete theoretical development of universal jurisdiction", due to a lack of investigation by legal commentators and others, has led to the under-usage of the jurisdictional principle).

50. Hervé Ascensio, *'Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in Guatemalan Generals'.* 1 J. INT'L CRIM. JUST. 690, 699 (2003).

51. Summers, *supra* note 23, at 83; *see e.g.* Arrest Warrant, *supra* note 12; Regina v. Bartle ex

jurisdiction breaches conservative notions of sovereign authority, sovereign immunity, and immunity for State officials.[52] Although these antiquated notions of sovereignty are perceived to be the biggest roadblocks to proper enforcement of international criminal law, universal jurisdiction must mesh with the reigning Westphalian world order, or else be doomed to under-usage. Additionally, questions surround the legal legitimacy of universal jurisdiction, specifically its clarity, internal consistency, and adherence to other legal principles.[53] The disproportionate use of universal jurisdiction by developed countries against the citizens of developing countries calls into question whether the doctrine is fair and predictable, and whether universal jurisdiction instigates sovereign inequality.[54] Allowing universal jurisdiction to be practiced in domestic courts is called undemocratic by some, because the practice of universal jurisdiction is principally judge-made law that has little to no legislative input and may not reflect the "...deepest commitments of their own political communities."[55] Finally, sovereign States using universal jurisdiction have patently failed and will continue to fail at bringing justice to the commission of international crimes. Relying on States to conduct international criminal cases remains the linchpin problem for universal jurisdiction.[56] Sovereign states have the luxury of pursuing or ignoring international law violations,[57] and coupled with the lack of experience, resources, cooperation, and numerous procedural obstacles that face a State court in exercising universal jurisdiction,[58] it is easy to see why universal jurisdiction is often avoided. Although the State-centric model of universal jurisdiction fails to

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parte Pinochet, [2000] 1 A.C. 147 (H.L. 1999), *reprinted in* 38 I.L.M. 581, 634-38 (1999) (separate opinion of Lord Hutton) (discussing the conflicting, competing interests of having immunity for high government officials versus the need for accountability for those that commit international crimes).

52. Arrest Warrant, *supra* note 12, at 22-23; Winston P. Nagan & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, 43 COLUM. J. TRANSNAT'L L. 141, 149 (2004) (arguing that state sovereignty is the most important facet of international order and authority); Charles Pierson, *Pinochet and the End of Immunity: England's House of Lords Holds that a Former Head of State is Not Immune for Torture*, 14 TEMP. INT'L & COMP. L.J. 263, 269-70 (2000).

53. THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 50-194 (Oxford Univ. Press 1990); Sriram, *supra* note 18, at 368-69.

54. Sriram, *supra* note 18, at 369-71; Bottini, *supra* note 13, 554-57; *see e.g.*, Redress Memo, *supra* note 35, New Redress Memo, *supra* note 35.

55. Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L. J. 1057, 1101-02, 1091-93 (2004); *see also* Bottini, *supra* note 13, 550-52 (explaining that universal jurisdiction violates the commonly held legal principle of due process of law, because of differences in domestic criminal laws, disagreement over what crimes spur universal jurisdiction, and the defendant in a foreign country, "may not possess any knowledge of their laws, penalties, or criminal procedures. There are sometimes great differences among members of the international community in the definitions of crimes, the determination and extent of the penalties,...").

56. Broomhall, *supra* note 14, at 399; *see* Bottini, *supra* note 13, at 506, 557-561 (discussing in depth why universal jurisdiction lacks sufficient incentive to national authorities—which are present in other jurisdictional principles—to proceed with a case).

57. *See* Bottini, *supra* note 13, at 514; Scharf, *supra* note 26, at 52-59.

58. BROOMHALL, *infra* note 59, at 118-126; *See* Broomhall, *supra* note 14, at 410-18 (listing all the reasons a national court would refrain from taking on a universal jurisdiction case, such as finances, evidence, security, witnesses, inexperience).

fulfill the global need for an effective international criminal enforcement system,[59] the continued use of universal jurisdiction by States should not be discouraged, because such State practices will play a vital supplementary role in enforcing international criminal law and developing an effective international criminal system.[60]

III. TRIBUNALS

A. Nuremberg Tribunal: Overview of the First International Criminal Tribunal

"The international court established to adjudicate at Nuremberg marked the creation of the first such tribunal to evaluate war crimes and crimes against humanity."[61] The jurisdictional theory of the Nuremberg Tribunal is not entirely clear, for a majority of international legal scholars contend that the Nuremberg Tribunal was simply the Allied forces (U.S., U.S.S.R., U.K., and France) exercising their newly attained sovereign authority over Germany, or more specifically, exercising criminal judicial functions as the newly established government of the defeated Germany.[62] However, one argument gaining legitimacy is that the Nuremberg Tribunal constituted the first example of sovereign States acting as the judicial agents of the international community through "a type of universal jurisdiction theory."[63] This argument promotes the belief that the Nuremberg Tribunal was an extension or adaptation of traditional universal jurisdiction, particularly the idea of collective universal jurisdiction whereby each Allied power could have exercised universal jurisdiction over the Nazis for international crimes individually, but the Allied powers instead choose to adjudicate the Nazi international criminals collectively; thus, combining each Allied powers' ability to adjudicate "international crimes over which there exists

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59. BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT 112-127 (2003) (cataloguing numerous reasons States have abstained from practicing universal jurisdiction); ANTONIO CASSESE, INTERNATIONAL LAW 452-53 (2d ed. 2005); SADAT, *infra* note 200, at 10.

60. *See* William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement,* 24 MICH. J. INT'L L. 1, 2-4, 16-20, 75-101 (2002) (detailing the benefits and characteristics of a system of courts exercising universal jurisdiction); *see e.g.,* Redress Memo, *supra* note 35; New Redress Memo, *supra* note 35.

61. Laurie A. Cohen, Comment, *Application of the Realists and Liberal Perspectives to the Implementation of War Crimes Trials: Case Studies of Nuremberg and Bosnia,* 2 UCLA J. INT'L L. & FOREIGN AFF. 113, 143 (1997); *but see* SADAT, *infra* note 200, at 27, fn. 22 (explaining that historical examples of international criminal tribunals, prior to the Nuremberg Tribunals, do exists, but none of them possesses the legal significance as that of the Nuremberg Tribunal); *see also* SCHABAS, *infra* note 331, at 7 (describing how the distinguished jurists and judge B. V. A. Röling maintained that the Tokyo and Nuremberg tribunals were not "'international tribunals in the strict sense'" but were more aptly described as "'multinational tribunals'").

62. Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany, U.S.-USSR-UK-Fr., June 5, 1945, 60 Stat. 1649, TIAS 1520; The International Military Tribunal (Nuremberg) Judgment and Sentence *reprinted in* 41 AM J. INT'L L.172, 172, 216, 248 (1947) [hereinafter Judgment of Oct. 1, 1946]; *See* SADAT, *infra* note 200, at 28; Morris, *supra* note 18, at 342-45 ("The Nuremburg tribunal, then, likely was not an instance of the exercise of universal jurisdiction in the post-war trials"); Morris, *supra* note 42, 37-43.

63. Tonya J. Boller, The *International Criminal Court: Better Than Nuremberg?,* 14 IND. INT'L & COMP. L. REV. 279, 304 (2003).

universal jurisdiction."[64] While it is inconsequential for this Note's purposes which argument prevails, it is undisputed that the Allied forces established jurisdiction over the defeated Nazis through the "Charter of the International Military Tribunal, annexed to the London Agreement, [which] provided the blueprint for the Nuremberg Tribunal."[65]

The Charter of the International Military Tribunal was a joint agreement of the Allied Forces enumerating international criminal charges that the Allied forces could bring against Nazi suspects, specifically charges for the violation of international laws against war crimes, crimes against peace, and crimes against humanity.[66] Evidence in support of these charges was overwhelming, and understandably, there was considerable world-wide support, led by the U.S., for the judicial adjudication of the Nazis' use of concentration camps and other criminal activities.[67] However, the international community's ability to prosecute the Nazis for their conduct was limited given that international criminal law, at the time, was scant and what law did exist was vague.[68] Consequently, the Nuremberg Tribunal has been criticized for taking part in the application of *ex post facto* laws, and criticized further that even if the Nuremberg Tribunal applied valid laws, these international laws did not impose individual criminal responsibility for their violation.[69] The Nuremberg Judgment, in answering these objections, plainly stated that these crimes existed through custom and treaties at the time of their commission, and that "[c]rimes against international law are committed by men,

64. SADAT, *infra* note 200, at 117; *see* Judgment of Oct. 1, 1946, *supra* note 62, at 216 (stating that when the Allied Powers applied international customary and conventional laws against the defeated Nazis, "they have done together what any one of them might have done singly" . . .) This breed of universal jurisdiction is termed "universal international jurisdiction", such where a collection of States have universal jurisdiction over an international crimes due to its *jus cogens* status, and rather than argue over primacy of jurisdiction, the States agree to form a non-State actor to adjudicate the crime or crimes. However, this concept is altered a bit in the ICC, in that the formation of the non-State actor to adjudicate the crime(s) is formed prospectively, not in an *ad hoc* fashion, like the Nuremberg, ICTY, and ICTR. This idea is discussed more in depth later in this Note. *Infra* note 220 and accompanying text.

65. M&S YUGO, *infra* note 60, at 3; SADAT, *infra* note 200, at 27-8.

66. Charter of the International Military Tribunal, Aug. 8, 1945, art. 6, 82 U.N.T.S. 284, 288, 59 Stat. 1546, 1548 *annexed to* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279, 59 Stat. 1544; CASSESE, *supra* note 59, at 439.

67. CARTER ET. AL, *infra* note 385, at 1085; CASSESE, *supra* note 59, at 439; POWER, *supra* note 1, at 31-7; Cohen, *supra* note 61, at 118-35 (chronicling the long list of evidence against the Nazi suspects, and exhibiting the international and public opinion for an international tribunal to try the Nazis).

68. Cohen, *supra* note 61, at 137 (asserting that the only international criminal laws available at the time of the Nuremberg trial was the Hague Convention and Geneva Convention, which had little international criminal precedent associated with them); Remarks by M. Cherif Bassiouni, Panel Session, *Forty Years After the Nuremberg and Tokyo Tribunals: The Impact of the War Crimes Trials on International and National Law*, 80 AM. SOC'Y INT'L L. PROC. 56, 62-63 (1986); Remarks by Telford Taylor, *id*, at 57-58.

69. CASSESE, *supra* note 59, at 440-41; M&S YUGO, *infra* note 60, at 9; SADAT, *infra* note 200, at 30; Boller, *supra* note 63, at 310. For an explanation on the importance of individual criminal liability, read relevant portions of Mettreaux's book. *See* METTRAUX, *infra* note 113, at 9-12.

not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced..."[70] Yet, the Nuremberg Tribunal, having been established by the victors of World War II, has not fully escaped the criticism of "victor's justice".[71]

Despite these and other legitimate concerns, the Nuremberg Charter, Tribunal, and subsequent Judgment represents the most significant development in the advancement of international criminal tribunals, international criminal law, and indeed, one of the greatest developments in international law itself.[72] The Nuremberg Tribunal established the foundational principles of international criminal law, which includes the principle that any individual—including generals and presidents—can be held criminal responsible for violations of international law, and the principle that international law preempts national law.[73] These and other foundational international criminal law principles instituted by the Nuremberg Tribunal, Charter, and Judgment—commonly referred to as the Nuremberg Principles—were determined to be customary international law by the U.N. General Assembly and the U.N. International Law Commission.[74] Additionally, the Nuremberg Tribunal produced much needed international criminal law precedent,[75] and legitimized the use of law in fair trials with due process as a method of correcting international wrongs.[76] Prospectively, the Nuremberg Principles influenced a majority of international human rights

70. Judgment of Oct. 1, 1946, *supra* note 62, at 221; CASSESE, *supra* note 59, at 440.

71. M&S YUGO, *infra* note 60, at 9. It is hard not to believe that the Nuremberg Tribunal was, to some degree or another, unfair and an example of victor's justice. The Allied forces surely committed international crimes during one of only two world wars. Regardless of this glaring defect, the Nuremberg Tribunal was an invaluable moment in international criminal law.

72. BROOMHALL, *supra* note 59, at 19, 42, 49 (stating that the Nuremberg legacy gave birth to "modern system of human rights protection" and "underpin(ned) the relationship between sovereignty and the international system in the post-War era"); M&S YUGO, *infra* note 60, at 9; *see* CARTER ET. AL, *infra* note 385, at 976, 1085. Although there was a sister tribunal to the Nuremberg Tribunal, commonly called the Tokyo Trials, this tribunal does not carry the same amount of historical and legal weight as the Nuremberg Tribunal, because the Tokyo Trials were fundamentally unfair to defendants. SADAT, *infra* note 200, at 27; M&S RWANDA, *infra* note 123, at 8 n.42 ("[i]n his dissenting opinion, the French Judge at Tokyo expressed his view that 'so many principles of justice were violated during the trial that the Court's judgment certainly would be nullified on legal grounds in most civilized countries'"). Furthermore, the Tokyo Trials were formed by military order of the U.S. Supreme Commander of the Allied Forces at Tokyo. Charter of the International Military Tribunal for the Far East at Tokyo, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, April 26, 1946, T.I.A.S. No. 1589, 4 Bevans 20.

73. Charter of the International Military Tribunal, *supra* note 63, art. 7; SADAT, *infra* note 200, at 29, 30.

74. Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95(I), U.N. GAOR, 1st Sess., at 188, U.N. Doc. A/64/Add.1 (1946), *available at* http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/033/46/IMG/NR003346.pdf?OpenElement [hereinafter Nuremberg Principles]; Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, [1950] 2 Y.B. Int'l L. Comm'n 364, UN Doc. A/CN.4/SER.A/1950/Add. 1, *available at* http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf.

75. *See e.g.*, Nuremberg Principles, *supra* note 74.

76. M&S YUGO, *infra* note 79, at 9, 10.

conventions, and provided invaluable legal precedent and philosophical support to subsequent international tribunals, to Alien Tort Claims Act jurisprudence in U.S. courts, and to the enforcement of international criminal law in many domestic forums around the world.[77]

B. ICTY

1. The History of the Former Yugoslavia and Facts that Led to the Formation of the ICTY

Geographically, former Yugoslavia was situated inside the Balkans, a large, rugged region of southeastern Europe. The Balkans peninsula is one of the most historically rich and fervently fought-over areas of the world. Ethnic wars, centuries-long occupations, and social struggles have littered its history for longer than a millennium.[78] The Balkans' turbulent history, for the most part, is credited to the struggle between three religious groups that each possess very strong, distinct identities: Roman Catholic Croats, Orthodox Christian Serbs, and Muslims who mainly constitute converts to Islam while the area was under the Ottoman Empire rule.[79] The advent of World War II and the Nazi occupation of the Balkans revived inter-ethnic fighting in the region, which eventually resulted in the execution of thousands of Croats, Serbs, and Muslims.[80] However, the Balkans' misery ended with the creation of the former Yugoslavia—the Socialist Federal Republic of Yugoslavia—after the end of World War II, which was a loosely federated nation under the Communist rule of Josip Tito.[81]

The former Yugoslavia was made up of several republics, namely Bosnia-Herzegovina (Bosnia), Serbia, Croatia, Macedonia, Montenegro, and Slovenia.[82]

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77. Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶414 (31 July 2003), *available at* http://www.un.org/icty/stakic/trialc/judgement/stak-tj030731e.pdf; SADAT, *infra* note 200, at 28; Paul L. Hoffman, *Justice Jackson, Nuremberg and Human Rights Litigation*, 68 ALB. L. REV. 1145, 1145-1152 (2005) (emphasizing the practical and theoretical impact of the Nuremberg Tribunal and Nuremberg Principles on international human rights conventions, Alien Tort Claims Act jurisprudence in U.S., and in other countries' jurisprudence as well); Henry King, Jr., *Commentary: The Modern Relevance of the Nuremberg Principles*, 17 B.C. THIRD WORLD L.J. 279, 280 (1997) (characterizing the Nuremberg trials and the Nuremberg Principles as extremely influential in the formation of most major human rights conventions/treaties).

78. POWER, *supra* note 1, at 285; ARNOLD SHERMAN, PERFIDY IN THE BALKANS 26-29 (Psichogios Publications 1993) (giving overview of Balkan history); Cervoni, *infra* note 171, at 490; Andras Riedlmayer, *A Brief History of Bosnia-Herzegovenia,* (1993), http://www.kakarigi.net/manu/briefhis.htm (chronicling the history of the Bosnia).

79. VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS 18 (1995) [hereinafter M&S YUGO]; Cervoni, *infra* note 171, at 489-90; Riedlmayer, *supra* note 78.

80. M&S YUGO, *supra* note 79 (detailing how Croat forces ethnically cleansed Serbs in Croatia, and Serbs retaliated with the ethnic cleansing of Croats and Muslims under Serb control); Cervoni, *infra* note 171, at 491 (detailing the international crimes that occurred under Nazi occupation of the Balkans); Riedlymayer, *supra* note 78.

81. M&S YUGO, *supra* note 79; Cervoni, *infra* note 171, at 491; Riedlymayer, *supra* note 78.

82. M&S YUGO, *supra* note 79; Aileen Yoo, *Kosovo: Jeruselum of Serbia*, WASH. POST, *available at* http://www.washingtonpost.com/wp-srv/inatl/longterm/balkans/overview/kosovo.htm (last updated July 1999) (discussing Yugoslavia's communists roots).

Despite social, political, cultural, and economic prosperity under Tito, ethnic tensions in the former Yugoslavia were not solved, but rather squelched with "stern repression".[83] The fifty plus years of "pent-up hatred" shared among these three groups for each other lead to a large degree of anxiety and tension in the former Yugoslavia—especially in Bosnia—during the late 1980's to early 1990's as a result of the power vacuum that occurred after the death of Tito and the collapse of Soviet influence in the area.[84] In the summer of 1991, the situation evolved into violence as Bosnian Muslims, Bosnian Serbs, and Bosnian Croats clashed with each other in armed conflicts over the future of Bosnia.[85] On the one hand, the Bosnian Muslims—who were the largest group in Bosnia—desired Bosnia to secede from what was left of the former Yugoslavia.[86] On the other hand, Bosnian Serbs who were militarily and financially supported by Slododan Milosević's Federal Republic of Yugoslavia did not want Bosnia to secede from Yugoslavia for military, cultural, and historical reasons.[87] In late 1991 and into 1992, Bosnian Muslims and other groups successfully orchestrated the secession of Bosnia from the former Yugoslavia through un-"representative" elections that were mainly boycotted by Bosnian Serbs, and Bosnia was recognized by the world community as a sovereign nation.[88]

The internationally recognized secession of Bosnia from the former Yugoslavia naturally agitated the more militarily powerful Bosnian Serbs—who declared themselves as another independent nation called the Serbian Republic of Bosnia and Herzegovina in 1992, later to be renamed Republika Srpska—into directing large-scale military onslaughts against the Bosnian Muslim and Bosnian

83. M&S YUGO, *supra* note 79; Cervoni, *infra* note 171, at 491.

84. Cervoni, *infra* note 171, at 491-92; Kalinauskas, *infra* note 86, at 387-388; *see* Tim Ito, *Bosnia and Herzegovenia*, WASH. POST, http://www.washingtonpost.com/wp-srv/inatl/longterm/balkans/overview/bosnia.htm (last updated October 1998) (discussing the history of the Bosnian conflict).

85. M&S YUGO, *supra* note 79, at 19-20; Mark A. Bland, *An Analysis of the United Nations International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia: Parallels, Problems, and Prospects*, 2 IND. J. GLOBAL LEGAL STUD. 233, 238-39 (1994) (discussing the beginning of the Bosnia conflict). Samantha Power offers a concise, yet thorough investigation into the lead-up to and actual commission of international crimes in Bosnia, reciting all that this Note has and will describe. POWER, *supra* note 1, at 247-81.

86. Bland, *supra* note 85; Mikas Kalinauskas, *The Use of International Military Force in Arresting War Criminals: The Lessons of the International Criminal Tribunal for the Former Yugoslavia*, 50 U. KAN. L. REV. 383, 389-90 (2002).

87. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 4, 87 (Feb 26), *available at* http://www.icj-cij.org/docket/files/91/13685.pdf; Bland, *supra* note 85 at 239; *see* M&S YUGO, *supra* note 79, at 19-20. In light of Milosević's death mid-trial, it is still being litigated at the ICTY as to the criminal responsibility, if at all, that Serbian superiors have for the military and financial support the Federalist Republic of Yugoslavia gave to Bosnian Serbs during the Bosnian war. *See, e.g.*, Prosecutor v. Perišić, Case No. IT-04-81-T, Amended Indictment, (Sept. 26, 2005), *available at* http://www.un.org/icty/indictment/english/per-ai050926e.pdf.

88. Bland, *supra* note 85, at 239; M&S YUGO, *supra* note 79, at 19-20; Kalinauskas, *supra* note 86, at 389.

Croat populations.[89] "The ensuing three-year war between the Bosnian Muslims, Bosnian Croats and the Bosnian Serbs would prove to be one of the most brutal conflicts in recent memory."[90]

As U.N. and European Union attempts to broker a cease-fire and peace in Bosnia failed, it became apparent through many public and private international observers that international crimes were occurring in Bosnia.[91] A U.N. report found that Bosnian Serbs militias, with the help of Yugoslavian military forces, were "making a concerted effort...to create ethnically pure regions..." of Bosnia,[92] which included the forced mass deportation of Muslims, mass executions of Muslims, whole-scale destruction of Muslim towns, and creation of over 400 Serb controlled detentions centers where Muslims were tortured and killed in the thousands.[93] Although popular media characterized Bosnian Serbs and Serbs elsewhere as the sole perpetrators of international crimes during this war, Muslims and Croats in and out of Bosnia were very much involved in their own ethnic cleansing campaigns, albeit on relatively smaller scales.[94] Regardless of which group deserves what portion of blame, the commission of international crimes during Bosnia's succession from the former Yugoslavia led to death of over 250,000 civilians and the displacement of millions more.[95]

2. U.N. Intervention

The growing accounts of atrocities combined with the unwillingness on the

89. M&S YUGO, *supra* note 79, at 19-20; Kalinauskas, *supra* note 86, at 389; *see* Ito, *supra* note 84.

90. Ito, *supra* note 84.

91. M&S YUGO, *supra* note 79, at 20-21.

92. The Secretary General, *Further Report of the Secretary General Pursuant to Security Council Resolution 749*, ¶ 5, *delivered to the Security Council*, U.N. Doc. S/23900 (May 12, 1992); Cervoni, *infra* note 171, at 492-93.

93. M&S YUGO, *supra* note 79, at 21-22; Kalinauskas, *supra* note 86, at 389-90.

94. M&S YUGO, *supra* note 79, at 22; Kalinauskas, *supra* note 86, at 390; Ito, *supra* note 84; *see generally* SHERMAN *supra* note 78 (making a persuasive case that each Bosnian ethnic group had plans and/or undertook plans to "ethnically cleanse" Bosnia of the other ethnic groups, and further argued that US/UN/NATO intervention in Bosnia in defense of Muslims and Croats and against Serbs was arbitrary, because each Balkan ethnic group was equally reprehensible for war crimes, genocide, crimes against humanity, and other international crimes); *but see* POWER, *supra* note 1, at 307-10 (stating that attempts to blame all ethnic groups in Bosnia for committing international crimes distorts the reality that Serbs were by far the worse international criminals in Bosnia during this war, and such distorting efforts were done by Western countries as an excuse for not intervening into the Yugoslavian war). Regardless of the rhetoric on both sides of the argument, international crimes were committed by Croats and Muslims in and outside of Bosnia, and have been and are being adjudicated by the ICTY. *See, e.g.*, Prosecutor v. Orić, Case No. IT-03-68-T, Judgment, (July 30, 2006), *available at* http://www.un.org/icty/oric/trialc/judgement/ori-jud060630e.pdf; Prosecutor v. Gotovina et al., Case No. IT-06-90-PT, Joinder Indictment, (July 24, 2006), *available at* http://www.un.org/icty/indictment/english/got-joind060724e.pdf.

95. Virginia Morris & Michael P. Scharf, *Preface to* M&S YUGO, *supra* note 79; M&S YUGO, *supra* note 79, at 22 (stating the over 2.1 million people, or over 50% of the Bosnian population were "killed or driven from their homes..."); POWER, *supra* note 1, at 251(estimating 200,000 Bosnian deaths); Paul R. Williams & Francesca Jannotti Pecci, *Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination*, 40 STAN. J. INT'L L. 347 (2004).

part of the world community to intervene militarily and the ineffectiveness of economic sanctions[96] led to passage of U.N. Security Council Resolution 780 in 1992 that created a commission of experts to investigate and collect evidence regarding alleged violations of international criminal and humanitarian law in the former Yugoslavia.[97] This U.N. Commission submitted its report concluding that violations of international humanitarian law were in fact occurring in the former Yugoslavia and formally endorsing the formation of an *ad hoc* international tribunal to adjudicate these violations.[98] Pursuant to this report, the U.N. Security Council passed U.N. Security Council Resolution 808 (Resolution 808) in 1993 that "...'officially' declared 'ethnic cleansing' in the former Yugoslavia to be a 'threat to international peace and security'... "[99] and most importantly, confirmed the U.N. Security Council's intention to create an *ad hoc* tribunal.[100]

Although Resolution 808 was the first stage in creating the ICTY, in that it obligated the U.N. to create such an *ad hoc* tribunal, "[t]he Security Council did not indicate in Resolution 808 either the legal basis or the method for establishing the tribunal."[101] In order to assist the Security Council on how to create the an *ad hoc* international criminal tribunal, Resolution 808 mandated that the Secretary-General issue a report on the legally acceptable methods of creating what would later become the ICTY.[102] This report evaluated three options: Security Council Resolution, General Assembly negotiations, or treaty negotiations.[103] Both Treaty and General Assembly negotiations were discarded as viable options, mainly because time requirements needed for negotiations of any type did not comport with the expressed urgency to create the ICTY.[104] Adopting the U.N. Security

96. Allison Marston Danner, *When Courts Make Law: How The International Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1, 19 (2006).

97. S.C. Res. 780, U.N. Doc. S/RES/780 (Oct. 6, 1992), *available at* http://daccess-ods.un.org/TMP/4597908.html; M&S YUGO, *supra* note 79, at 24-26; Kalinauskas, *supra* note 86, at 393.

98. The Secretary-General, *Letter Dated 9 February 1993 from the Secretary General Addressed to the President of the Security Council*, ¶¶ 31-60, ¶¶ 72-74, *delivered to the Security Council*, U.N. Doc. S/25274 (Feb. 10, 1993); M&S YUGO, *supra* note 79, at 28-29; Cervoni, *infra* note 171, at 493 ("In October of 1992, after more than a year of engaging in ineffective scare tactics in light of well-documented atrocities, the UN Security Council...finally decided to act."); Kalinauskas, *supra* note 86, at 393.

99. Cervoni, *infra* note 171, at 493.

100. S.C. Res. 808, ¶ 1, U.N. Doc. S/RES/808 (Feb. 22, 1993), *available at* http://daccess-ods.un.org/TMP/298421.8.html; M&S YUGO, *supra* note 79, at 31.

101. M&S YUGO, *supra* note 79, at 40; Danner, *supra* note 59, at 19; *see Ralph Zacklin, Some Major Problems in the Drafting of the ICTY Statute*, 2 J. INT'L CRIM. JUST. 361 (2004).

102. S.C. Res. 808, *supra* note 100, ¶ 2; *see* Kerry R. Wortzel, *The Jurisdiction of an International Criminal Tribunal in Kosovo*, 11 PACE INT'L L. REV. 379, 387 (1999) (exhibiting the importance of UN Resolution 808, and the legal authority behind the ICTY).

103. The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶¶ 18-30, *delivered to the Security Council*, U.N. Doc. S/25704 (May 3, 1993) [hereinafter Res. 808 Report].

104. *Id.* at ¶¶ 19-22; M&S YUGO, *supra* note 79, at 40-42; Zacklin, *supra* note 101, at 361-62 (explaining additionally that treaty negotiations only bind those that sign and ratify the treaty, and it would be inconceivable that parties to the Bosnian conflict would sign onto such a treaty).

Council Resolution approach,[105] the U.N. Department of Legal Affairs, with assistance from States and non-governmental organizations, drafted a proposed statute for the ICTY.[106] The draft statute of the ICTY was adopted without change and little to no debate by Security Council members in U.N. Security Council Resolution 827 (Resolution 827) of 1993, marking the U.N. Security Council's second and final step in creating the ICTY.[107]

As asserted by the U.N. Security Council, the cumulative effect of Resolution 808 and 827 gave the U.N. Security Council the legal authority to create the ICTY. As previously mentioned, the U.N. Security Council decided in Resolution 808 that the situation in the former Yugoslavia was a "threat...to...international peace and security" in violation of Article 39 of the U.N. Charter.[108] Consequently, Resolution 808 triggered the U.N. Security Council's ability to use Article 41 of the U.N. Charter, which states that "[t]he Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decision."[109]Article 29 of the U.N. Charter and ICJ's jurisprudence on Article 29 confirmed the U.N.'s ability to create subsidiary, judicial bodies as a "measure...to give effect to its decision".[110]

Theoretically speaking, a UN *ad hoc* tribunal, like the ICTY, is a product of each U.N. Member State bestowing a part of its sovereignty, specifically "a measure of criminal jurisdiction", to the U.N. Security Council to establish an international criminal tribunal to adjudicate violations of international law on behalf of the Member States.[111] The precedent created by the Nuremberg Tribunal validates that States individually or collectively have the power to create tribunals

105. *See* M&S YUGO, *supra* note 79, at 41-42 (explaining that the U.N. Security Council Resolution approach was expeditious and binding on all states).

106. Res. 808 Report, *supra* note 103, at annex; M&S YUGO, *supra* note 79, at 32-33; Danner, *supra* note 59, at 19-20; Kalinauskas, *supra* note 86, at 393; *see* Zacklin, *supra* note 101, at 361.

107. S.C. Res. 827, U.N. Doc. S/RES/827, (May 25, 1993), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement; M&S YUGO, *supra* note 79, at 33-34; Danner, *supra* note 59, at 20 ("For the first time since Nuremberg and Tokyo, an international court was endowed with the authority to punish violations of the laws of war. A step that had been steadfastly resisted by delegates at the Diplomatic Conferences in 1949 and 1974-77 was, in the press of events in 1993, embraced by the Security Council almost without comment."); Michele Caianiello & Giulio Illuminati, *From the International Criminal Tribunal for the Former Yugoslavia to the International Criminal Court*, 26 N.C. J. INT'L L. & COM. REG. 407, 420 (2001); Christopher S. Wren, *Judge Says Yugoslavia Impedes Work of War Crimes Tribunal*, N.Y. TIMES, Nov. 9, 1999, at A7.

108. S.C. Res. 808, *supra* note 100; Chapter VII of U.N. Charter, Article 39 states: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain and restore international peace and security." U.N. Charter, ch. 7, art. 39.

109. M&S YUGO, *supra* note 79, at 42-44; Caianiello & Illuminati, *supra* note 107, at 420-21; Kalinauskas, *supra* note 86, at 395-96.

110. U.N. Charter, art. 29; Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 47, 53-56 (July 13), *available at* http://www.icj-cij.org/docket/files/21/2123.pdf; Kalinauskas, *supra* note 86, at 395-96.

111. M&S YUGO, *supra* note 79, at 45.

for the exclusive reason of adjudicating violations of international criminal law.[112] Correspondingly, this power to create tribunals was one of the powers Member States bestowed to the U.N. Security Council to use towards effectuating their decisions, or in the case of the former Yugoslavia, to give effect to its decision in Resolution 808 to maintain international peace and security.[113]

As an *ad hoc* tribunal with limited territorial, temporal, and personal jurisdiction,[114] the ICTY was bound to adjudicate only law that was "beyond any doubt customary international law" at the time of the conflict[115] Otherwise, the ICTY would be plagued with additional, complex jurisdictional questions, such as if the former Yugoslavia—or any of the sovereign nations that came out of the Yugoslavian conflict—was a State Party to a particular convention or treaty and if such convention or treaty imposed criminal responsibility on individuals?[116] Consequently, the subject matter jurisdiction of the ICTY consisted of four

112. *Id.*

113. The establishment of an international criminal jurisdiction can be achieved only by States which, in effect, confer on the international court a measure of the criminal jurisdiction which every State possesses as an essential element of its sovereignty. As recognized by the Nuremberg Tribunal, any State or group of States may decide to establish a court for the purpose of exercising jurisdiction with respect to crimes under international law. In this particular instance, the States that were members of the Security Council decided to establish an international criminal jurisdiction by means of a binding decision of the Council. In doing so, these States acted not as individual States on their own behalf, but rather as the Security Council exercising its right to adopt measures for the maintenance of international peace and security on behalf of the Member States of the United Nations. *Id*; *but see* Prosecutor v. Milutinović et al., Case No. IT-99-37-PT, Decision on Motion Challenging Jurisdiction, ¶¶ 46-8 (May 6, 2003) (separate opinion of Judge Patrick Robinson) (arguing that while theoretically true that the U.N. could have formed the ICTY or like court via Nuremberg-type delegation of jurisdiction, the ICTY was in fact formed by the Security Council independently exercising its Chapter VII powers to adopt measures for the maintenance of international peace and security, and not upon delegated authority from States). Judge Robinson's opinion on universal jurisdiction is worth reading. He clarifies that "a large part of the difficulty in determining whether an international criminal tribunal such as the Nuremberg IMT, the ICTY or the ICTR exercises universal jurisdiction is explained by the failure to distinguish between the basis for the creation of that tribunal (a question that raises the issue of the delegation by States of their jurisdictional powers to an international tribunal), and the jurisdiction that is actually exercised by it by virtue of its Statute or customary international law." *Id.*, at ¶ 34.

114. Pursuant to its Statute, the ICTY possessed limited temporal jurisdiction (only international crimes committed after January 1, 1991) limited personal jurisdiction (only people, not corporations, or States), and limited territorial jurisdiction (only areas under the territory of the former Socialists Federal Republic of Yugoslavia). Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, arts. 1, 6, 8, U.N. Doc. S/RES/827 (May 25, 1993), *available at* http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb06-e.pdf [hereinafter ICTY Statute].

115. Res. 808 Report, *supra* note 103, ¶ 34; M&S YUGO, *supra* note 79, at 51-52; GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS 5 (2005).

116. M&S YUGO, *supra* note 79, at 51-52; *see* METTRAUX, *supra* note 113, at 6-7; *but see* Prosecutor v. Galić, Case No. IT-98-29-T, Judgment and Opinion, ¶¶ 63 et seq. (Dec. 5, 2003), *available at* http://www.un.org/icty/galic/trialc/judgement/gal-tj031205e.pdf (convicting the defendant of "terror" and "attacks on civilians" based on Additional Protocol I of Geneva Conventions, not considered customary law at the time); *infra* section III, D. On a similar note, because U.N. Security Council decisions only bind States, it was necessary for the Security Council–in the case of ICTY and ICTR–to create a subsidiary judicial body that could make judicial decisions on individuals and have those decisions be binding, rather than recommendations. M&S YUGO, *supra* note 79, at 44-47; M&S RWANDA, *infra* note 123, at 102, 106.

categories of customary international criminal laws:[117] grave breaches of the Geneva Convention; violations of the laws and customs of war; genocide, and crimes against humanity.[118]

(This Note would fail to recognize the full scale of international crimes committed in the former Yugoslavia if it did not mention that after the creation of the ICTY in 1993, the commission of international crimes within the former Yugoslavia continued at a shocking pace. Probably the most horrific international crimes occurred in the UN-protected Srebrenica enclave of Bosnia in 1995 where over 7,000 Muslim men and boys were executed and many more Muslim women, young children, and elderly were deported.[119] Additionally, the Serbian siege of Kosovo in the late 1990's also ended in the commission of international crimes that resulted in the death of over 11,000 Muslims and the mass deportation of Muslims out of Kosovo.[120] These later episodes of international crimes in the former Yugoslavia, however, are being adjudicated by the ICTY as well.[121])

C. ICTR

1. The History of Rwanda and Facts that Led to the Formation of the ICTR

Colonization by European powers significantly shaped the history of Rwanda, which is a common story among African countries. Unfortunately, Europe's influence over Rwanda did not cease when the last colonizers left. The foundation

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117. The term "customary international criminal law" will be used often in this Note, and refers to international criminal laws that have attained customary international law status. The term "conventional international criminal law" will also be used, and refers to international criminal laws created by convention or treaty. However, it is important to remember that most conventional international criminal laws do not attach individual criminal liability for their violation, but rather obligates State Party to the convention or treaty to enforce the law of the convention or treaty, and the convention and treaty will only make the State Parties directly responsible for their violation. See *infra* section III, D; IV, A.

118. ICTY Statute, *supra* note 114, arts. 2-5. For an easy to understand comparison of the difference in subject matter jurisdiction of the ICTY and the ICTR, read former ICTY President and Judge McDonald's article on international criminal tribunals. Judge Gabrielle Kirk McDonald, *The International Criminal Tribunals: Crime & Punishment in the International Arena*, 25 NOVA L. REV. 463, 466-67 (2001). Additionally, the *ad hoc* tribunals' statutes were formulated with Judges in mind, "[t]he Statutes of the *ad hoc* Tribunals (ICTY and ICTR) contain much more than the skeletons of the crimes that are within their jurisdictions. The definitions of these crimes and the application of the law of international crimes in general, therefore, call further refinement to be made by the Court which has been entrusted by the Security Council with the task of apply to Statute whilst ensuring that it was not thereby legislating new international law. METTRAUX, *supra* note 113, at 5 (alteration).

119. DAVID ROHDE, *End Game: The Betrayal and Fall of Srebrenica, Europe's Worst Massacre since World War II*, at XVI, 388, 402; POWER, *supra* note 1, at 411-421. Power's entire portrayal of the international crimes that occurred in Srebrenica is amazing in its own right. *See* POWER, *supra* note 1, at 391-441. Yet, nothing gives a more riveting and captivating story of all facets of the Srebrenica massacres and mass deportations than Rohde's book End Game. *See generally* ROHDE, *supra* note 119.

120. POWER, *supra* note 1, at 466, 472.

121. *See, e.g.*, Prosecutor v. Popović et al., Case No. IT-05-88-PT, Consolidated Amended Indictment, (Nov. 11, 2005), *available at* http://www.un.org/icty/indictment/english/pop-scai060614.pdf; Prosecutor v. Milutinović et al., Case No. IT-05-87-PT, Third Amended Joinder Indictment, (June 21, 2006), *available at* http://www.un.org/icty/indictment/english/milu-3aji060621e.pdf.

of the international crimes that occurred in Rwanda in 1993 unquestionably grew out of Rwanda's colonial days.[122] Prior to the influx of a German population into Rwanda at the end of the nineteenth century,[123] the two main socio-ethnic groups that comprise Rwanda, the Hutus and Tutsi, are believed to have shared a peaceful co-existence.[124] Despite stereotypical physical differences between the two groups, some ethnographers and historians believe Tutsis and Hutus are not exclusive ethnic groups, and furthermore, most Tutsis and Hutus share the same language and religion.[125] Unfortunately, minor social, economic, and political differences between Tutsis and Hutus were brought to the forefront after German colonizers took control of Rwanda, doing so by using Tutsis as the proxy rulers over the Hutu population.[126] Belgium took control of Rwanda after World War I, and instituted a brutal hierarchical system whereby Tutsis were molded and manipulated into the ruthless ruling class of Rwanda and Hutus were subject to excessive forced labor, which in turn, created a bright line in Rwanda's population between Tutsis and Hutus.[127] The most lasting effect of Belgium's rule was an identification card system instituted in 1933 that labeled Rwandans as either Hutu or Tutsi, which later played an enormous role in the genocide and international crimes that played out in Rwanda in 1994.[128]

As Belgian colonizers' rule over Rwanda drew to an end, Belgium switched allegiance to the Hutus, encouraging them to revolt against the ruling Tutsi, which eventually led to the Hutu population seizing control of the country in 1959.[129] The following decades in Rwanda resulted in the mass exodus of Tutsis into neighboring countries, Hutu domination, and "...numerous massacres of members of the Tutsi tribe in Rwanda,...in 1963, 1966, 1973, 1990, 1992, and 1993."[130] After the bloody fighting between the Hutu-dominated Rwanda government and Tutsi rebels ceased in 1993, the U.N.-backed Arusha Accord was signed, which

122. *See generally*, Paul J. Magnarella, *Special Issue: Rwanda 10 Years On. I.) How Could It Happen? The Background and Causes of the Genocide in Rwanda*, 3 J. INT'L CRIM. JUST. 801 (2005) (tracking the pre-colonial and colonial history of Rwanda and its effect on the genocide that occurred in 1994 that lead to the creation of the ICTR).

123. VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 49 (1998); *id.* at 802 [hereinafter M&S RWANDA].

124. Magnarella, *supra* note 122, at 803; *but see* Magnarella, *supra* note 122, at 802-06 (explaining that Tutsis held a higher social class, possessed a majority of the political and military power, and essentially the ruling class of Rwanda in comparison to the larger group. Being Tutsis was widely considered nobility whereas being Hutu was considered peasantry).

125. ALISON DES FORGES, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 4, 33 (1999), *available at* http://www.hrw.org/reports/1999/rwanda/index.htm#TopOfPage; M&S RWANDA, *supra* note 123, at 48-9; *see* Magnarella, *supra* note 122, at 804-805.

126. M&S RWANDA, *supra* note 123, at 49; Magnarella, *supra* note 122, at 806-07; *see* Mark A. Drumbl, *Law and Atrocity: Settling Accounts in Rwanda*, 31 OHIO N.U. L. REV. 41, 43 (2005).

127. DES FORGES, *supra* note 125, at 34-38; Magnarella, *supra* note 122, at 807-08.

128. DES FORGES, *supra* note 125, at 37-38; M&S RWANDA, *supra* note 123, at 49; Magnarella, *supra* note 122, at 808.

129. DES FORGES, *supra* note 125, at 38-39; M&S RWANDA, *supra* note 123, at 50; Magnarella, *supra* note 122, at 809.

130. M&S RWANDA, *supra* note 123, at 47; DES FORGES, *supra* note 125, at 39-40; Magnarella, *supra* note 122, at 809-12.

called for the political and military integration of the Hutus and Tutsis into a single government.[131] However, a retrospective view of Rwanda at this time reveals the specter of genocide lurking beneath the surface. Even before the negotiations of the Arusha Accord, Hutu hardliners grew weary of their increasingly moderate President Juvénal Habyarimana, and these hardliners, which included close allies of President Habyarimana, laid the groundwork to kill every single Tutsi in Rwanda.[132] The genocidal framework included: stockpiling massive amounts of machetes and six million dollars worth of firearms all across Rwanda,[133] training large amounts of Hutus on "methods of mass murder and indoctrination in ethnic hatred",[134] constant radio transmission encouraging genocidal intent against Tutsis, and similar radio banter labeling the Arusha Accord as an agreement between Tutsis rebels and Hutu sympathizers.[135] President Habyariamana, while returning from a meeting in Tanzania on the implementation of the Arusha Accord, was assassinated when his plane was shot down by Hutu hardliners, who in turn blamed Tutsis rebels for the assassination in numerous radio addresses to the population of Rwanda.[136]

What followed the assassination was "...the most efficient mass killing since the atomic bombings of Hiroshima and Nagasaki" and a "...rate of slaughter...three to four times that of the number of Jews killed in the Holocaust."[137] Within 30 minutes of the crash, the elite Presidential Guard sealed off the airport,—which stopped any attempts by the U.N. to investigate the airplane crash—checked every single Rwandans' identity card, and executed any identified Tutsis.[138] After the assassination of President Habyariamana and the airport massacre, the Hutus hardliners executed their plan for genocide, which spread like an angry beehive throughout the country.

> The assassins' first priority was to eliminate Hutu opposition leaders...After that, the wholesale extermination of Tutsis got underway... With the encouragement of [radio] messages and leaders at every level of society, the slaughter of Tutsis and the assassination of Hutu oppositionists spread from region to region. Following the militias' example, Hutus young and old rose to the task. Neighbors hacked neighbors to death in their homes, and colleagues hacked

131. DES FORGES, *supra* note 125, at 123-26; M&S RWANDA, *supra* note 123, at 50-51; Magnarella, *supra* note 122, at 813.

132. DES FORGES, *supra* note 125, at 3-5; M&S RWANDA, *supra* note 123, at 51-53; Magnarella, *supra* note 122, at 814.

133. DES FORGES, *supra* note 125, at 3-5, 127; M&S RWANDA, *supra* note 123, at 52.

134. M&S RWANDA, *supra* note 123, at 52; *see* Magnarella, *supra* note 122, at 814.

135. DES FORGES, *supra* note 125, at 4-12; M&S RWANDA, *supra* note 123, at 51-52; Magnarella, *supra* note 122, at 814.

136. DES FORGES, *supra* note 125, at 5-6, 181-85; M&S RWANDA, *supra* note 123, at 53; Magnarella, *supra* note 122, at 815.

137. Susan W. Tiefenbrun, *The Paradox of International Adjudication: Developments in the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the World Court, and the International Criminal Court*, 25 N.C. J. INT'L L. & COM. REG. 551, 556; 585 (2000).

138. M&S RWANDA, *supra* note 123, at 54.

> colleagues to death in their workplaces. Doctors killed their patients, and schoolteachers killed their pupils. Within days, the Tutsi populations of many villages were all but eliminated... Radio announcers reminded listeners not to take pity on women and children.[139]

As the days wore on, militias "were sent to rural areas not just to kill, but to force the local people to kill. Often, people were compelled to kill their neighbors or members of their own families. The extremists' aim was for the entire Hutu population to participate in the killing."[140] One hundred days later, 800,000 Tutsis, and Hutus that were perceived as sympathizers, were killed, representing ten to eleven percent of Rwanda's total population.[141] The genocide did not stop until exiled Tutsis rebels—who were just as cognizant of the international crimes occurring in their country as the rest of the world yet received little to no international support in their efforts—invaded and amazingly fought their way into control of Rwanda.[142]

2. U.N. Intervention

Unsurprisingly, the very first similarity that the creation of the ICTR shared with the creation of its predecessor, the ICTY, was the international communities' inability to do anything swiftly in reaction to the international crimes occurring in Rwanda. Adding insult to injury, the mere thought of setting up the ICTR only came about well after genocide and hostilities were "virtually over."[143] Even the impassioned pleas by the newly elected prime minister of Rwanda for the formulation of an international tribunal and a report by an U.N. High Commissioner for Human Rights detailing the criminal events in Rwanda were not enough to persuade the U.N. Security Council or the U.S. to live up to their respective duties to act in the face of genocide.[144] Fortunately, the U.N. Special Rapporteur for Rwanda submitted his extensive report to the U.N. Security Council which "finally spurred the Security Council to acknowledge that 'acts of genocide have occurred in Rwanda'" in Security Council Resolution 925[145] and caused U.S. Secretary of State to testify before the U.S. Senate that "[i]t's a terrible situation that calls out for international action."[146]

Using the ICTY as a precedential template, the U.N. Security Council instituted a Commission of Experts for Rwanda to investigate violations of

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139. Magnarella, *supra* note 122, at 815.

140. M&S RWANDA, *supra* note 123, at 58 (stating that one estimate had half of the Hutu population participating in the genocide).

141. DES FORGES, *supra* note 125, at 15-16; M&S RWANDA, *supra* note 123, at 55; Drumbl, *supra* note 126, at 42; Magnarella, *supra* note 122, at 816; Tiefenbrun, *supra* note 137, at 556.

142. Drumbl, *supra* note 126, at 44.

143. Daphna Shraga & Ralph Zacklin, *The International Criminal Tribunal for Rwan*da, 7 EUR. J. INT'L L. 501, 505 (1996); *see* M&S RWANDA, *supra* note 123, at 61.

144. M&S RWANDA, *supra* note 123, at 61-62; *see* DES FORGES, *supra* note 125, at 24-25, 640-44.

145. S.C. Res. 925, at 1, U.N. Doc. S/INF/50 (June 8, 1994), *available at* http://daccess-ods.un.org/TMP/5305671.html.

146. *Christopher Urges Trial Over Genocide in Rwanda*, WASH. POST, July 1, 1994, at A29.

international humanitarian law.[147] Despite the clear indication by the Commission of Experts that violations of international humanitarian law in Rwanda called for the establishment of an *ad hoc* tribunal,[148] bureaucratic and diplomatic wrangling dragged on for months. While the international community wrestled with the decision to create either a separate *ad hoc* tribunal for Rwanda or add jurisdiction over Rwanda to the 18 month old ICTY, the government of Rwanda fluctuated in its support for an *ad hoc* Rwanda tribunal, ultimately ending in official opposition to the formation of such a court.[149] However, the Rwanda's leadership indicated that the government would cooperate if such an *ad hoc* tribunal was created despite its official opposition, thus clearing the way for the U.N. Security Council to pass Resolution 955 (Resolution 955) in 1994 establishing the ICTR.[150]

In Resolution 955, the U.N. Security Council determined that "genocide and other systematic, widespread and flagrant violations of international humanitarian law" committed in Rwanda "constitute a threat to international peace and security."[151] Relying on its precedent in forming the ICTY, Resolution 955 additionally called for the creation of an *ad hoc* tribunal to combat the threat to international peace and security in Rwanda; thus, the ICTR was created in one resolution with an attached ICTR statute, rather than the two resolutions that created the ICTY.[152] Except for this minor difference in legislative history, the U.N. Security Council established both the ICTY and ICTR pursuant to its powers under Chapter VII, particularly Article 39 and 41, and created both *ad hoc* tribunal based on the same legal and philosophic theories.[153]

The ICTR and the ICTY diverge, however, in terms of subject matter jurisdiction. Even though "[t]he ICTR Statute was modeled closely on that of the ICTY",[154] as reported by the Secretary General, "...the Security Council elected to take a more expansive approach to...the applicable law than the one underlying the

147. S.C. Res. 935, U.N. Doc. S/RES/935, ¶ 1 (July 1, 1994), *available at* http://daccess-ods.un.org/TMP/1393874.html.

148. *Preliminary Report of the Independent Commission of Experts established in accordance with Security Council Resolution 935,* ¶¶ 146-49, *delivered to the Security Council,* U.N. Doc. S/1994/1125 (Oct. 4, 1994); Raymond Bonner, *U.N. Commission Recommends Rwanda 'Genocide' Tribunal*, N.Y. Times, Sept. 29, 1994, at A13.

149. M&S RWANDA, *supra* note 123, at 66-71.

150. S.C. Res. 955, U.N. Doc. S/RES/955, ¶ 1 (Nov. 8, 1994), *available at* http://daccess-ods.un.org/TMP/2132961.html [hereinafter Res. 955]; M&S RWANDA, *supra* note 123, at 71-72.

151. Res. 955, *supra* note 150, at 1; M&S RWANDA, *supra* note 123, at 103; Akhaven, *infra* note 152, at 502.

152. The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955,* ¶ 7, *delivered to the Security Council*, UN Doc. S/1995/134, ¶¶1; 9 (Feb. 13, 1995) [hereinafter Res. 955 Report]; M&S RWANDA, *supra* note 123, at 101; Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501, 502 (1996) ("In establishing the Rwanda Tribunal, however, the Security Council decided that 'drawing upon the experience gained in the Yugoslav Tribunal, a one-step process and a single resolution would suffice.'"); Catherine Cisse, *The International Tribunals for the Former Yugoslavia and Rwanda: Some Elements of Comparison*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 103, 109 (1997).

153. *See infra* Part III, Section B. ICTY / U.N. Intervention. This same legal/philosophic theories discussed in this section apply to the ICTR as well.

154. Danner, *supra* note 59, at 23.

statute of the [ICTY]."[155] Two circumstances dictated a subject matter change in the ICTR. First, genocide and crimes against humanity played a more prevalent role in Rwanda and in the U.N. Security Council's reactions to Rwanda compared to the former Yugoslavian situation.[156] Second, the armed conflict that occurred in Rwanda was an internal armed conflict and purely incidental to the international crimes committed in Rwanda,[157] thus certain international humanitarian laws did not apply.[158] Consequently, several aspects of the ICTR statute differ from the ICTY statute: the preamble of the ICTR statute specifically mentions genocide and the first international criminal offense listed is genocide;[159] Article 3 of the ICTR statute on crime against humanity does not require a nexus with an armed conflict, but rather requires a nexus between the proscribed inhumane acts and discriminatory grounds;[160] the grave breaches provisions of 1949 Geneva Conventions are not included in Article 4 of ICTR dealing with war crimes, because those provisions only deal with international armed conflicts and; Article 4 of ICTR statute does include common Article 3 to the 1949 Geneva Conventions and the 1977 Additional Protocol II, which are provisions that apply to internal armed conflicts.[161]

D. The Flaws of the Ad Hoc Tribunals

There is no doubt that the ICTY and the ICTR are tremendous triumphs in international criminal law.[162] These *ad hoc* tribunals have unquestionably chipped away at international impunity, added considerably to international criminal jurisprudence, exemplified the viability of international criminal law, and established the willingness of the international community to fight international hostilities with the rule of law.[163] The UN *ad hoc* tribunals' most notable

155. Res. 955 Report, *supra* note 152, ¶12; M&S RWANDA, *supra* note 123, at 127; Cervoni, *supra* note 171, at 497-498; *but see* METTRAUX, *supra* note 113, at 10 (indicating that this distinction by the Secretary General between the subject matter jurisdiction of the ICTY and ICTR might have been "'an unintentional distinction'").

156. Cisse, *supra* note 152, at 109-110.

157. *Id.* at 107.

158. M&S RWANDA, *supra* note 123, at 142; Akhavan, *supra* note 152, at 503; Tiefenbrun, supra note 137, at 562-63. It is imperative to stress that the belief at the time of the creation of the ICTR that international humanitarian law did not unequivocally apply to internal armed conflicts, as opposed to international armed conflicts, has changed dramatically since the ICTR's creation. Today, international humanitarian law is applied to internal armed conflicts. Prosecutor v. Tadić, *supra* note 25, ¶¶ 128-30; 133-34; M&S RWANDA, *supra* note 123, at 128-30.

159. Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, Pmbl., art. 2, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]; Cisse, *supra* note 152, at 109-110.

160. ICTR Statute, *supra* note 159, art. 3; Akhaven, *supra* note 152, at 503; *see* M&S RWANDA, *supra* note 123, at 126.

161. ICTR Statute, *supra* note 159, art. 4; M&S RWANDA, *supra* note 123, at 126; Akhaven, *supra* note 152, at 503.

162. M&S RWANDA, *supra* note 123, at 37; Yacob Haile-Mariam, *The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court*, 22 HASTINGS INT'L & COMP. L. REV. 667, 738 (1999); Beth Stephens, *Accountability for International Crimes: The Synergy Between the International Criminal Court and Alternative Remedies*, 21 WIS. INT'L L.J. 527, 541 (2003).

163. Tolbert & Solomon, *infra* note 164, at 36-37 (stating additionally that the *ad hoc* tribunals

contribution is its impact on the future, for the "['ICC']...would not have been possible without the ad hoc tribunals' trailblazing work."[164] Without intentionally trampling on the predominantly positive legacy of the ICTY and ICTR, it is imperative to point out that these and any other *ad hoc* tribunals are merely stepping stones towards the realization of a true international criminal law system, and not end goals in themselves. An examination of the various types of problems faced by both the ICTY and ICTR illustrates the serious inadequacies with *ad hoc* tribunals.

On a practical level, the ICTY and ICTR were forced to confront a whole host of problems intrinsic with being *ad hoc* tribunals. As *ad hoc* tribunals, the ICTY and ICTR each had to be built from the ground up, literally and figuratively.[165] In the case of the ICTR, all of the components that any judicial institution needs to operate, such as roads, courtrooms, legal staff, and detention units, were far from being finished before the ICTR began working.[166] During the time wasted on establishing the entire infrastructure of these *ad hoc* tribunals, there were no mechanisms in place to protect evidence and, as in the situation with the ICTY, to stop further international crimes from occurring.[167] Not surprisingly, being required to build the ICTY and ICTR from scratch made both not only time-consuming, but also overly expensive.[168]

Both *ad hoc* tribunals suffered from severe logistical and administrative nightmares.[169] The ICTY labored through years of little to no cooperation from

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"...have an international legal basis and avoid the label of 'victor's justice',... [the *ad hoc* tribunals] have been widely viewed as conducting fair trials, providing a measure of justice to victims, and removing war criminals from the seats of power and thus 'clearing the ground' for more responsible government.") *see generally* Payam Akhavan et al., *The Contribution of the Ad Hoc Tribunals to International Humanitarian Law,* 13 AM. U. INT'L L. REV. 1509 (1998).

164. David Tolbert & Andrew Solomon, *United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies,* 19 HARV. HUM. RTS. J. 29, 37 (2006).

165. Everything and anything imaginable that is associated with operating a judicial tribunal had to be established for both the ICTY and ICTR from scratch. Hiring thousands of employees, creating hiring procedures, establishing document storage systems, building detention centers for suspects, finding buildings where the tribunal and its satellite office would be placed, developing internal tribunal rules and procedures, starting health care programs for personnel, purchasing security systems, wiring the buildings for internet, and so on, are components of any judicial tribunal that in the case of the ICTY and ICTR, were non-existent and needed to be established in order for these tribunals to function. And in the future, all of the money and time that went into creating the ICTY and ICTR will finish with these institutions shutting down forever.

166. Erik Mose, *Main Achievements of the ICTR,* 3 J. INT'L CRIM. JUST. 920, 921-22 (2005); Akhaven, *supra* note 152, at 508-509.

167. SADAT, *infra* note 200, at 31.

168. Olivia Swaak-Goldman, *Recent Developments in International Criminal Law: Trying to Stay Afloat Between Scylla and Charybdis,* 54 INT'L & COMP. L. Q. 691, 693-94 (2005); *see* Akhaven, *supra* note 152, at 508-509.

169. To this day, these types of problems persist. The ICTY, for instance, has not been able to secure the arrest of General Ratko Mladić, who allegedly directed the Srebrenica massacres, and the alleged mastermind behind the commission of international crimes by Serbs, Serbian politician Radovan Kradzdić. BBC News, *The Hague's Wanted Men,* http://news.bbc.co.uk/2/hi/europe/1935955.stm#km (last visited October 19, 2007).

former Yugoslavian States and Western countries.[170] Most disturbing was the fact that extraditing indicted individuals, serving subpoenas, or carrying out court orders were near impossible tasks.[171] This severe lack of cooperation was caused by the "toothless" language in the U.N. Resolutions that created the ICTY, which effectively undercut the ICTY's authority over indicted suspects.[172] If a State refused to cooperate with the ICTY, the ICTY's only recourse was to complain to the U.N. Security Council.[173] Although the Dayton Peace Agreement (DPA)[174]—an agreement between the former Yugoslavian republics that included provisions mandating their cooperation with the ICTY—was created to fix these cooperation issues, the DPA could not fully cure the structural problems inherent in the ICTY.[175] As for the ICTR, it may have experienced more State cooperation than its sister UN *ad hoc* tribunal, but it endured through allegations of corruption, terribly inadequate facilities, and severe pre-trial delays and detentions.[176] Combining these problems with complaints about their physical location and poor outreach programs, and both UN *ad hoc* tribunals appear distant, ineffective, political, and illegitimate to the affected populations.[177] Indeed, the population of Rwanda and the former Yugoslavia themselves have expressed these precise negative opinions in regards to the ICTY and ICTR.[178] As a result, the ICTY and ICTR are unable to gain authenticity with those who were the most affected by the tragedies in the former Yugoslavia and Rwanda.

Theoretically and legally, *ad hoc* tribunals like the ICTY and ICTR have additional faults. Focusing first on the legal perspective, both *ad hoc* tribunals apply international criminal law which is far from flawless, as illustrated by the subsequent conduct of these tribunals' chambers. While both the ICTY and ICTR were given statutes by the U.N. Security Council to use, the scope of their

170. Danner, *supra* note 59, at 24-25; Kalinauskas, *supra* note 86, at 399.

171. Rocco P. Cervoni, *Beating Plowshares Into Swords—Reconciling the Sovereign Right to Self-Determination With Individual Human Rights Through an International Criminal Court: The Lessons of the Former Yugoslavia and Rwanda as a Frontispiece*, 12 ST. JOHN'S J. LEGAL COMMENT. 477, 510 (1997); Kalinauskas, *supra* note 86, at 399-400; *See* Igor Jovanovic, *Serbia and the UN War Crimes Tribunal: An Historical Overview*, S.E. EURO. TIMES (Belgrade), Jan. 24, 2004 *available at* http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/articles/2005/01/24/reportage-01 (reporting either specifics instances or reports of Bosnian war criminals evading the ICTY).

172. Cervoni, *supra* note 171, at 509.

173. *Id.* at 508-09.

174. *See generally* General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, Dec. 14, 1995, 35 I.L.M. 75 (1996) (signing of which was meant to cure the jurisdictional issues regarding the ICTY obtaining former Yugoslavian criminal suspects).

175. *See* Cervoni, *supra* note 72, at 514 (arguing that the DPA had no real effect on the situation of Bosnian war criminals evading extradition or other means of being subjected to the ICTY); Kalinauskas, *supra* note 86, at 399-410 (discussing the lack of cooperation and structural problems with the ICTY, but additionally discussing the unfortunate consequences on ICTY's mandate that came from the ICTY having to resort to other enforcement measures, which including using NATO).

176. *See* Tiefenbrun, *supra* note 137, at 589.

177. Danielle Tarin, *Prosecuting Saddam and Bungling Transitional Justice in Iraq*, 45 VA. J. INT'L L. 467, 512-514 (2005); *see id.* at 564-65; 583-584.

178. Jean-Marie Kamatali, *From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans*, 12 NEW ENG. J. INT'L & COMP. L. 89, 90.

jurisdiction *ratione materiae* and the definitions of the crimes within their jurisdiction were left to the *ad hoc* tribunals to determine.[179] In the case of the ICTY, the U.N. Security Council and the ICTY Appeals Chambers specifically directed the ICTY to make their jurisdictional determinations and crime definitions based solely on customary international criminal law that existed at the time of the Yugoslavia conflict, because those are the only international crimes that without doubt applied to the potential defendants at the time of commission.[180] Although the ICTY today diligently follows the rule that only customary international criminal law applies within ICTY Chambers,[181] the influential *Tadić* Appeals Chambers hinted at the application of international *conventional* law to ground jurisdiction over a defendant,[182] and an ICTY Trial Chamber actually did ground jurisdiction over a defendant based on treaty law.[183] In relation, the ICTR, following what it believed was the broader mandate given to it by the U.N. Secretary General to use international customary *and* conventional law,[184] has used international *conventional* law to ground jurisdiction over a defendant's conduct and/or define crimes it applies against defendants much more expansively than its' sister UN tribunal.[185]

By permitting such judicial conduct, the ICTY and ICTR exposes itself to legitimate legal criticism. The most notable concern is the problem evident in the legal distinction between "illegality and criminality."[186] Facially, international conventional laws only bind States, not individuals,[187] so it is illegal, but not criminal for anyone to violate international conventional law or treaties.[188] Only the ratifying State is liable for the violation of an international conventional law, and depending on the international conventional law violated, an individual who violated an international convention or treaty law would only become liable for such a violation if a ratifying State gained jurisdiction over the violator and choose to prosecute the individual.[189] Criminality, on the other hand, refers to violations of either customary international criminal law or international conventional laws

179. METTRAUX, *supra* note 113, at 5; *see supra* section III, B-C.

180. Res. 808 Report, *supra* note 103, ¶ 29; *see e.g.,* Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, ¶¶110, 139, 141 (July 29, 2004), *available at* http://www.un.org/icty/blaskic/appeal/judgement/bla-aj040729e.pdf.

181. *See* METTRAUX, *supra* note 113, at 9.

182. Prosecutor v. Tadić, supra note 25, ¶ 143.

183. Prosecutor v. Galić, *supra* note 116, ¶¶ 63 et seq.

184. *See* Res. 955 Report, *supra* note 152, ¶12.

185. *See, e.g.,* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 604-607 (Sept 2, 1998); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment and Sentence, ¶ 353 (May 15, 2003).

186. METTRAUX, *supra* note 113, at 9.

187. There exist *conventional* international criminal laws that create individual criminal responsibility for violations of provisions within these international convention or treaty, such as Genocide Convention or the ICC's Rome Statute. Rome Statute of the ICC, *infra* note 207, art. 25; *see* Convention on the Prevention and Punishment of the Crime of Genocide, art. 4, 6, Dec. 9, 1948, 102 Stat. 2045, 78 U.N.T.S. 277, *available at* http://www.unhchr.ch/html/menu3/b/p_genoci.htm [hereinafter Genocide Convention]. However, these types of conventions/treaties are the extreme minority.

188. METTRAUX, *supra* note 113, at 8-9, 11.

189. *Id.* at 8.

that have attained the status of customary international criminal law whereby the violation includes individual criminal responsibility for the perpetrator of the violation.[190] Therefore, when the ICTY and ICTR grounds jurisdiction[191] over defendants for violating international conventional law alone or in conjunction with other reasons, these *ad hoc* tribunals are artificially attaching individual criminal responsibility to "illegality", or violations that have not attained criminal status as a matter of customary international law.[192] The ICTY and ICTR, hence, show a willingness not only to charge a defendant with a violation of a conventional international law, but also to convict the defendant, in part or in whole, due to this violation, simply because the Judge says the violation itself is criminal. Consequently, the jurisdictional and judicial purity of these *ad hoc* tribunals is called into question in light of their failure to take the critical step of demonstrating that a conventional international law has attained individual criminal responsibility as a matter of customary international law.

There is an additional concern surrounding the use of international conventional law by *ad hoc* tribunals. Oftentimes, the use of international conventional law confuses the clarity of the crimes charged by and the jurisdiction asserted by the *ad hoc* tribunals. Specifically, many international conventional laws used by the ICTY and ICTR are outdated and some crimes listed under the ICTY and ICTR statute only exists in international customary law, so the use of international conventional law in tandem with customary laws or exclusively sacrifices uniformity in the development of customary international criminal law.[193] Accordingly, *ad hoc* tribunals lack the legal justification to prosecute under most conventional international law, and should properly be relegating to using customary international criminal laws only. Yet, this is not an attractive predicament considering that customary international criminal law is not easily defined and amorphous in nature.

From a theoretical perspective, the very notion of *ad hoc* international criminal tribunals is disjointed when one considers the context within which these tribunals were formed and the underlying crimes that these tribunals adjudicate.

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190. *Id.* at 9, 11. Technically, attaining criminality status means that the individual can be criminally prosecuted for the violation without any need for a domestic State to prosecute the individual. However, that presumes that the individual was under the jurisdiction of an international tribunal that could prosecute the individual (i.e. ICTY, ICTR, ICC). In reality, a violation of an international custom or international conventional law that has attained customary international criminal law status would most likely be prosecuted by a domestic nation that had legitimate jurisdiction over the perpetrator.

191. When the word "jurisdiction" is used in this way, it is meant to include jurisdiction to adjudicate.

192. *See* METTRAUX, *supra* note 113, at 5-11. There are circumstances where a conventional international law/treaty could be applied against a defendant without legal questions being raised. In the case of the ICTY and ICTR, it would be where a defendant was charged with a violation of a convention/treaty that either Yugoslavia or Rwanda was a ratifying member of, and the corresponding violation can be legally proven to include individual criminal responsibility for the perpetrator of the violation. "But that is not the same as suggesting...that, regardless of its crystallization under customary international law, the treaty *itself* may form the basis of a criminal conviction." *Id.* at 9.

193. *See id.* at 11.

The moral outrage expounded by the world community in regards to the former Yugoslavian and Rwandan war crimes, crimes against humanity, and genocide was unmistakably intense.[194] Additionally, it is beyond doubt that the underlying acts that led to the creation of these *ad hoc* tribunals represent the absolute worst and most reprehensible human behavior. Juxtapose these examples of unforgivable human conduct and subsequent widespread intense outrage next to the ultra-political, slow to materialize, and problem-riddled ICTY and ICTR, and the incongruence is readily apparent. The world's reaction of disgust and condemnation to these instances of grotesque international criminal conflicts must justly be followed by the fair adjudication of the breaches of international criminal law in an already established forum or tribunal. Anything less than an established tribunal for the prosecution of alleged war crimes, crimes against humanity, genocide, etc. intrinsically casts doubt on the veracity of the world's contempt against such deplorable human behavior. The method of creating the *ad hoc* tribunals, moreover, is ridiculed as undemocratic and unfair, because the ICTY and ICTR were bestowed with the requisite sovereign authority to practice international criminal jurisdiction indirectly from U.N. States pursuant to U.N. Security Council resolution, which means all these States ceded away their sovereignty without a vote on or a genuine chance to "engage in a debate about their cession of sovereignty."[195]

The lack of a permanent international criminal tribunal creates *ex post facto* institutional problems as well, for the formation of the tribunal occurs after the commission of the crime. This last point differs from *ex post facto* criminalization, or the criminalization of conduct after the conduct occurs,[196] because an *ex post facto* institutional problem instead focuses on the lack of an institution to adjudicate breaches of international criminal law. Within a domestic jurisdiction, it would be unfair if the jurisdiction criminalized conduct X and never created or expressed any intention to create an institution responsible for adjudicating conduct X, but then indicted an individual for committing conduct X and created

194. *See* POWER, *supra* note 1, at 251, 276; Bland, *supra* note 85, at 234; Cervoni, *infra* note 72, at 483-84; J.F.O. McAllister Washington, *Atrocity and Outrage: Specters of Barbarism in Bosnia Compel the U.S. and Europe to Ponder: Is It Time to Intervene?*, TIME, Aug. 17, 1992 *available at* http://www.time.com/time/archive/preview/0,10987,976238,00.html; *see, e.g.*, Editorial, *Bosnia Without Illusions – Bosnian Crimes Against Humanity*, NAT'L REV., Aug. 31, 1992, at 12, *available at* http://www.findarticles.com/p/articles/mi_m1282/is_n17_v44/ai_12666339/pg_1. It must be highlighted that unlike the entire world's reaction of moral outrage to the international crimes being committed in Bosnia, the response to the international crimes occurring in Rwanda was different. Unfortunately, only non-governmental organizations and like international organizations called for intervention into Rwanda, and powerful nations were simply indifferent to the Rwandan situation or intervened with small, relatively inconsequential forces. *See* Toby Gati, *Intelligence and the Use of Force in the War of Terrorism*, 98 AM. SOC'Y INT'L L. PROC. 150, 152, (2004) (explaining the importance of NGO's in bringing the world's attention to the international crimes in Rwanda); Marlise Simons, *France is Sending Force to Rwanda to Help Civilians*, N.Y. TIMES, June 23, 1994, at A1; *see UN Body Concedes It Failed Rwanda, Security Council Vows To Do More Next Time*, GLOBE & MAIL, Apr. 15, 2000, at A25.

195. SADAT, *infra* note 194, at 31.

196. BLACK'S LAW DICTIONARY 620 (8th ed. 2004).

an institution to prosecute the individual after the fact. Applying this same idea to the international arena, there might be agreement or codification that conduct X is internationally criminal, but without defining the forum in which conduct X crimes will be adjudicated, proper notice is not given to potential defendants that these crimes will be enforced. Concurrently, "*ad hoc* tribunals give the impression of arbitrary and selective prosecution",[197] because *ad hoc* tribunals are only designed to try particular international criminals, not all international criminals.[198] For this reason and others, *ad hoc* tribunals are seen as unfair, partial, and only applicable in narrow circumstances.[199] Law can only be applied fairly if the bricks and mortar created to house the law and the flesh and bones charged with enforcing the law exist, because without people and institutions, law is merely symbolic.

IV. ICC: LATEST DEVELOPMENT IN INTERNATIONAL CRIMINAL LAW

"The International Criminal Court is the last great international institution of the Twentieth Century. It is no exaggeration to suggest that its establishment could reshape our thinking about international law."[200] The creation of this "last great international institution of the Twentieth Century" did not materialize overnight. The ICC is the product of more than a century of international diplomacy in tandem with the learned experiences of the ICTY and ICTR.[201]

Prior to its establishment, the ICC was preceded by a multitude of beneficial, but ultimately unsuccessful international efforts to create the world's first permanent international criminal tribunal.[202] The catalytic events which propelled

197. SADAT, *infra* note 196, at 31. For some, the word "*ad hoc*" in the context of international criminal law means "selective". Antonio Cassese, *Is The ICC Still Having Teething Problems?*, 4 J. INT'L CRIM. JUST. 434 (2006).

198. The UN, which was the most important single institution in bringing about the ICC, itself criticized *ad hoc* tribunals as being "selective justice", due in part because the institutions themselves are built only after the crime is committed. *See Establishment of an International Criminal Court*, *supra* note 7.

199. *Summary Record of the 2300th Meeting*, [1993] 1 Y.B. Int'l Comm'n 16, ¶ 4, U.N. Doc. A/CN.4/SR.2300, *available at* http://untreaty.un.org/ilc/documentation/english/a_cn4_sr2300.pdf ("In the first place, as every lawyer knew, *ad hoc* courts were not the best method of administering criminal justice. The members of a court set up in response to a particular situation might be influenced by that situation and by, as it were, an obligation of result.") M&S YUGO, *supra* note 79, at 38; *see* M&S RWANDA, *supra* note 123, at 39-46.

200. LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM 8 (2002) (continuing by stating that "[f]or if many aspects of the Rome Treaty demonstrate the tenacity of traditional Westphalian notions of State sovereignty, there are nonetheless element of supranationalism and efficacy in the Statute that could prove extremely powerful. Not only doe the Statute place State and non-State actors side-by-side in the international arena, but the Court will put real people in real jails. Indeed, the establishment of the Court raises hopes that the lines between international law on the one hand and world order on the other are blurring, and that the normative structure being created by international law might one day influence or even restrain the Hobbesian order established by the politics of States.").

201. SADAT, *supra* note 200, at 42.

202. BROOMHALL, *supra* note 59, at 27-30, 63-66; *id.* at 21-45 (documenting the many episodes of international negotiations that either were failed attempts to create an ICC-like institution—which contributed to the creation of the ICC anyway—or episodes that generally contributed to the future creation of the ICC).

the international community over the proverbial hump that previously inhibited the creation of a permanent international criminal tribunal were undoubtedly the ICTY and ICTR.[203] The mere existence of the ICTY and ICTR, not to mention the trailblazing role in legal precedent that the ICTY and ICTR forged for the ICC, convinced the world community of the viability of a permanent international criminal court.[204] While the successes of the *ad hoc* tribunals spurred the world community into action, the ills of the *ad hoc* tribunals laid out shortcomings for the ICC to avoid, and to a degree, further accentuated the need for a permanent international criminal tribunal.[205] With this in mind, numerous governmental and non-governmental delegations from across the globe underwent the arduous and fragile task of meshing the varied legal backgrounds of the world, the varied beliefs on international criminal law, and the varied proposals put forth by each delegation into a single agreement to create a permanent international criminal court.[206] Their effort culminated in the Rome Statute of the International Criminal Court (Rome Statute) in 1998, which marked a new era in international law.[207] The following sections offer an historical, legal, and analytical overview of the ICC, which will serve as a context illustrating the problems solved and the issues missed by the ICC.

A. "Constitutional Moment": ICC's Revolutionary Jurisdiction to Prescribe

"When the creation of an international criminal court was first conceived, the focus was to build an effective prosecution and punishment regime"[208] In order to build such a regime, the ICC *had* to be "[t]he first permanent international criminal court..."[209] Yet, permanence was not the only factor necessary to create such a regime, for how such a regime was to be constructed became ever more important. The Rome Statute Framers, in deliberating on the method for creating the ICC, were influenced greatly by the ways in which Nuremberg, the ICTY, and the ICTR came to be, and also by the lessons learned from past futile attempts to create a permanent international criminal tribunal in a State-centric world of international

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203. BROOMHALL, *supra* note 59, at 71 (discussing the catalytic impacts of the ICTY and ICTR, including substantive and procedural international criminal law formation and successes of State cooperation, on the formation of the ICC); SADAT, *supra* note 179, at 39-40.

204. BROOMHALL, *supra* note 59, at 70; Bottini, *supra* note 13, at 504 (comparing the attitude of the world towards a permanent international criminal court before and after the ICTY and ICTR).

205. SADAT, *supra* note 200, at 40 ("even the problems they (ICTY/ICTR) faced . did not dampen enthusiasm for the ICC. Rather, they highlighted the urgent need for a permanent institution."). One of the stated goals of the ICC is "[t]o remedy the deficiencies of *ad hoc* tribunals." *Establishment of an International Criminal Court*, *supra* note 7.

206. BROOMHALL, *supra* note 59, at 70-76; SADAT, *supra* note 179, at 1-9, 275; Roy S. Lee, *How the World Will Relate to the Court: An Assessment of the ICC Statute*, 25 FORDHAM INT'L L.J. 750, 752 (2002) (describing the negotiation process needed to create the ICC statute).

207. Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9, 37 I.L.M. 999, *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf [hereinafter Rome Statute].

208. Lee, *supra* note 206, at 758.

209. PBS.org, Online News Hour, *U.N. Creates International Criminal Court*, http://www.pbs.org/newshour/updates/court_04-11-02.html (last visited Oct. 15, 2007).

law. Given that there is no supreme sovereign authority on this planet,[210] the historical foundation of all international laws is a "horizontal" system where the only actors are sovereign, independent States.[211] As a result, the only examples of international criminal law in practice is the few instances where the domestic courts of sovereign States are willing to apply international criminal law using some form of universal jurisdiction,[212] and the even fewer instances where sovereign States consent to the creation of an *ad hoc* international criminal tribunal.[213] With the reality being that States have a monopoly over the implementation of international criminal law and that the "horizontal" international law system is diametrically at odds with the inherently "vertical" legal concept of criminal law,[214] the Rome Statute Framers knew that a new approach was required in order to establish the ICC properly. More traditional international law-making approaches simply failed in creating a permanent international criminal court in the past, and new ideas and methods were required for the international community to accomplish the immense task of succeeding where others had failed.

As a result, the negotiations that preceded the creation of the Rome Statute were unlike any treaty negotiations in the history of international diplomacy. The Rome Statute, considering all of the facets of its creation, can be considered a "'[c]onstitutional moment'... a sea-change in international law-making" where true *legislative* behavior, a more or less unheard of concept in international rulemaking, was being undertaken by the international community.[215] Such international legislative action by the international community, as displayed during the creation of the Rome Statute, differs from traditional treaty or convention lawmaking in several respects.[216] First, the Rome Statute is not a "suppression convention" where State Parties agree, in the form of a treaty, that conduct X is criminal and that each State Party must make sure conduct X does not occur on its territory or anywhere within the State Party's control by passing domestic legislation criminalizing conduct X.[217] For this reason alone, it is said that

210. SADAT, *supra* note 179, at 11 (stating that one of the objections to the creation of an permanent international criminal tribunal "has been the absence of an international sovereign power with the authority to exert prescriptive jurisdiction over the human beings of the world").

211. BROOMHALL, *supra* note 59, at 65; CASSESE, *supra* note 59, at 5-6.

212. Again, domestic courts applying international criminal law includes the possibility that the court is applying customary and/or conventional international criminal law, and that the court uses permissive or mandatory universal jurisdiction to gain jurisdiction over the defendant(s) solely or in combination with domestic jurisdiction statutes. *See supra* section II.

213. Also, this statement does not imply that the international criminal tribunals were using universal jurisdiction in all instances. *See supra* section II; III. A.-C; *supra* note 44, 46.

214. *See* BROOMHALL, *supra* note 59, at 59, 65.

215. SADAT, *supra* note 200, at 11-14, 78-79, 108-09, 277; *see also* BROOMHALL, *supra* note 59, at 31, 67; *but see generally* United Nations Convention on the Law of the Sea art. 2(1), Dec. 10, 1982, 1833 U.N.T.S. 397. The Law of the Sea Convention, while another example of groundbreaking quasi-legislating by the international community in the creation of true international law, cannot be said to have the same implications or severity of legislating as the Rome Statute. SADAT, *supra* note 179, at 13.

216. *See* SADAT, *supra* note 200, at 12-13 (stating that given the circumstances surrounding the creation of the Rome Statute, it cannot be feasible to explain the legitimacy of the Statute on "classic theory of contract between absolute sovereigns (treaty-making) . . .").

217. BROOMHALL, *supra* note 59, at 12-14, 37. These suppression conventions are the exact kind of

suppression convention impose obligations on States, not on individuals directly.[218] Additionally, it is these suppression conventions that give rise to the already discussed "mandatory universal jurisdiction", or said differently, an obligation on a State Party to a convention or treaty to comply with the convention or treaty by discharging the State Party's jurisdictional authority—be it via territorial, nationality, passive personality, etc.—by making conduct X criminal domestically and punishing its commission within the State Party's territory or anyone under State Party's control.[219] In contrast to suppression conventions, the Rome Statute legislated directly that certain actions of individuals are internationally criminal per violation of Rome Statute law using a new form of universal jurisdiction that requires no subsequent State party legislation. Building off of the concept of "universal inter-state jurisdiction"[220] in developing the concept of "universal international jurisdiction", [221] the Framers of the Rome

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conventions/treaties that give rise to "mandatory universal jurisdiction" discussed above in this Note's section dedicated to universal jurisdiction. *See supra* section II.

218. BROOMHALL, *supra* note 59, at 13, 37.

219. *Id.* at 12-14, 37. The conduct criminalized under such suppression conventions, which in turn give rise to mandatory universal jurisdiction, are commonly called "treaty crimes." *Id.* at 30; *see also* SADAT, *supra* note 179, at 109. Note of clarification: Sadat refers to the conceptual ideas of "mandatory universal jurisdiction" and "permissive universal jurisdiction (concepts discussed extensively earlier in this Note) as "universal inter-State jurisdiction." It is from this concept of universal inter-state jurisdiction, as Sadat describes, that the Rome Statute alters this concept into universal international jurisdiction. *Infra* note 220.

220. The term "universal *inter-state* jurisdiction" is no different from the term "universal jurisdiction" used prevalently in this Note. Sadat defines universal inter-state jurisdiction no differently from the definition of universal jurisdiction used in this Note, "...the well-accepted theory of universal jurisdiction that derives from the idea that when criminal activity rises to a certain level of harm..., or sufficiently important interests of the international society are threatened, any State may apply its laws to the act, 'even if it occurred outside its territory, even if it has been perpetrated by a non-national, and even if its nationals have no been harmed by [it]'" SADAT, *supra* note 200, at 109-10 (footnote omitted). Inserting the term "inter-state" simply accentuates the use of universal jurisdiction by States, rather than non-State actors. The larger concept of "absolute" universal jurisdiction is simply *any* entity exercising universal jurisdiction over individual(s) under the same theory already discussed heavily in this Note. SADAT, *supra* note 200, at 109; *see supra* section II.

221. SADAT, *supra* note 200, at 109-10. "Universal international jurisdiction" is not the same, but similar to the concept of "international jurisdiction" mentioned earlier in this Note. *Supra* note 44 and accompanying text. International jurisdiction is the broader concept, and universal international jurisdiction is a subset of international jurisdiction. As stated above, international jurisdiction is where a non-State actor (i.e. an international tribunal like Nuremberg) receives delegated authority from State(s) to prescribe particular conduct as internationally criminal, adjudicate an individual(s) for commission of the international crime(s), and hopefully enforce their decisions through some means. Under the concept of international jurisdiction, there is no inquiry into the source of jurisdiction from which the delegating State(s) delegate jurisdictional authority to the non-State actor in the first place. If the delegated authority comes from the territorial jurisdiction of the delegating State(s), it would be said that the tribunal is practicing "territorial international jurisdiction." If, however, the source of the jurisdiction that the State(s) delegates to the non-State actor stems from universal jurisdiction, this can be said to be "universal international jurisdiction", as is the situation where the ICC Prosecutor will receive referrals from the Security Council, but not entirely the situation where the Prosecutor initiates their own investigation or an ICC State Party refers a case to the ICC Prosecutor (i.e. that would be territorial, or even nationality, international jurisdiction). In the U.N. Security Council referral situation, the ICC will initiate investigations into a suspected international crime using true universality principle,

Statute criminalized, in specific circumstances,[222] certain conduct of foreign individuals in foreign lands against foreign victims "by embodying prescriptive norms for the international community as a matter of substantive criminal law."[223] Specifically, the Rome Statute allows the ICC "to supplement, or even displace," national criminal laws applied pursuant to territorial principle in favor of the international criminal code set forth in the Rome Statute applied pursuant to universal international jurisdiction.[224] Hence, without any prerequisite for State Party legislations, the Rome Statute applies obligations on individuals directly by establishing a criminal code that is "universal in thrust and unbounded by geographical scope."[225]

Second, the method in which the Rome Statute was formed deviated from traditional convention and treaty creation methods, where the default rule is that decisions during negotiations are only made by consensus or unanimity, a blatant and traditional ode to sovereignty.[226] Instead,, the Rome Statute negotiations employed legislative voting procedures whereby super or simple majority votes resolved disputes and also brought about final substantive decisions.[227] Third, in a true sign of unparalleled international legislating the Rome Statute empowered the ICC to exercise jurisdiction to prescribe, to adjudicate, and to enforce, all in one document, which are jurisdictional powers that have historically been "the most jealously guarded precinct of State sovereignty."[228] A further indication that the

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because the State where the crimes occurred would not have anything to do with U.N. Security Council referring a situation to the ICC Prosecutor for possible investigation and prosecution, and the ICC Prosecutor—an non-State actor— obviously has no connection to the crime or criminal. Sadat defines universal international jurisdiction as, "[t]he international community as a whole, in certain limited circumstances, to supplement, or even displace, ordinary national laws of territorial application with international laws that are universal in thrust and unbounded in geographical scope." *Id.* at 110.

222. Rome Statute only makes criminal "the most serious crimes of concern to the international community as a whole." Rome Statute, *supra* note 207, art. 5(1). As will be discussed later in this Note, this is a pretty blurry line to draw.

223. SADAT, *supra* note 200, at 108-110. As discussed previously and will be discussed further in this Note, it is not as if the State Parties to the Rome Statute conjured up previously unheard of international laws, but were negotiating on the codification of already existing, but undefined customary international criminal laws, "the elaboration and adoption of an international criminal code as part of the Rome Treaty was perhaps the least controversial of the three jurisdictional axes within the Rome Statute, for the four categories of crimes within the Statute were consider *jus cogens* norm by most writers, even though their precise definition had not yet been completely agreed upon by all States." *Id.* at 108 (footnote omitted).

224. *Id.* at 108.

225. *Id.* at 110. The end result of the Rome Statute negotiations is that "the universality principle [universal jurisdiction] has been extended from a principle governing inter-State relations to one of general prescriptive international law . . ." *Id.* at 116-17 (alteration).

226. *See generally* INT'L L. COMM'N, REVIEW OF THE MULTILATERAL TREATY-MAKING PROCESS, U.N. Doc. ST/LEG/SER.B/21 (1985).

227. SADAT, *supra* note 200, at 11-14, 109, 280.

228. BROOMHALL, *supra* note 59, at 68; SADAT, *supra* note 200, at 107-108 (describing the Rome Statute as, "[t]hrough a rather extraordinary process, these three jurisdictional categories classically known to international law have been transformed from norms providing '*which State* can exercise authority over whom, and in what circumstances,' to norms that establish under what conditions the international community . . . may prescribe international rules of conduct, adjudicate breaches of those

Rome Statute possesses a unique international legislative quality is that the ICC is an independent legal and judicial entity, completely distinct from the U.N.[229] Finally, explicitly not permitting States to condition their signatures with reservations or deviations from the laws and procedures set forth in the Rome Statute solidifies the unprecedented legislative nature of the Rome Statute's creation.[230]

B. Role of Customary International Criminal Law in the ICC

While it is notable that the Rome Statute negotiations were radically different from treaty norms, the most revolutionary aspect of the Rome Statute was the Rome Statute itself. In the realm of international criminal tribunals, predecessors of the ICC were not created by treaty.[231] The ICC, therefore, was the byproduct of an extraordinary international act whereby an international criminal tribunal, including its substantive and procedural attributes, was created from the ground up through treaty negotiation between sovereign States. Aside from the obvious length of time treaty negotiations take, establishing the first permanent international criminal tribunal pursuant to treaty possesses advantages over other options, such as the ability to clarify and refine complex international criminal laws, create new binding substantive and procedural laws if need be, allow sovereign voices to be heard, and choose how treaty laws are to apply, if at all.[232] The difficult obstacle of creating the ICC demanded that the ICC be created by treaty negotiation rather than by other options, such as U.N. resolution,[233] but treaty negotiations complicated the relationship between customary international law, the historical hallmark of international criminal law, and the ICC. Past international criminal tribunals, including Nuremberg, ICTY, and ICTR, relied heavily on customary international law, because those international criminal tribunals were simply forums to adjudicate already existing customary

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rules, and enforce those adjudications"); *see* Antonio Cassese, *On the Current Trend Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 2, 6 (1998) (stating that one of the most precious powers of sovereignty is criminal/penal jurisdiction).

229. Rome Statute, *supra* note 207, art. 1, 2; SADAT, *supra* note 200, at 78-9.

230. Rome Statute, *supra* note 207, art. 120. This concept of not allowing reservation by Rome Statute signatory States must be distinguished from the Roaming ICC's concept of not allowing any deviations from the substantive and procedural Roaming ICC laws passed by Roaming ICC signatory States. *See infra* section V, B. Under the Rome Statute, when a State signs the Rome Statute, it cannot condition its signature/ratification with reservations to the substantive and procedural laws set forth in the Rome Statute. While this idea is also incorporated in the Roaming ICC proposal, when this Note says that Roaming ICC State Parties are not allowed to deviate from the substantive and procedural Roaming ICC laws, it is meant that the Roaming ICC State Parties cannot deviate from the Roaming ICC substantive and procedural laws that those State Parties *enact* into their own jurisprudence. *See infra* section V, B. This is not a reference to conditional signatures.

231. Both *ad hoc* tribunals were created by U.N. Resolutions. *See supra* section III, B-C. Nuremberg was a pseudo-treaty, but better described as either an agreement among Allied Powers on how to handle war criminals or the Allied powers acting as new government of Germany in exercising criminal jurisdiction. *See supra* section III, A.

232. SADAT, *supra* note 200, at 261 (detailing treaty advantages in regards to the ICC); *see* M&S YUGO, *supra* note 72, at 40 (explaining the advantages of creating the ICTY pursuant to treaty).

233. BROOMHALL, *supra* note 59, at 67-68.

international criminal laws.[234] Although it would be disingenuous to argue that customary international criminal law did not heavily influence the international criminal laws established under the Rome Statute, customary international law does not have the same relationship with the ICC as it did with Nuremberg, ICTY, and ICTR.[235] Differing from its predecessors, the ICC would solely adjudicate "the criminal code for the world",[236] or the laws legislatively created under the Rome Statute negotiations, and apply those laws prospectively;[237] hence, customary international criminal law is not the legal foundation of the ICC nor is it required that the ICC only apply customary international criminal law. Yet, customary international criminal law, by its nature, continues to evolve independently from the ICC [238] and the extent to which existing or future customary international criminal law would or would not influence the crimes enumerated in the Rome Statute or the future work of the ICC was an issue that needed resolution.

The dilemma surrounding the relationship between customary international law and the ICC is borne out of the political reality of the treaty making process, a reality that was particularly prevalent during the Rome Statute negotiations. Negotiations on any contentious international legal issue, like creating a permanent international criminal court, will involve a battle between two age-old competing interests: "sovereignty" and "international rule of law".[239] In the context of the Rome Statute negotiations, "international rule of law" supported the creation of a treaty that would attract sufficient State support to create an impartial, authoritative, and legitimate international criminal system, whereas "sovereignty" supported a treaty that would safeguard the independence, power, and discretion of all States.[240] As these competing interests expectedly bore themselves out during the Rome Statute negotiations in the form of the political compromises, anxiety grew over the effect such compromises would have on existing customary international criminal law, "[t]he concern arose that the treaty-making process

234. It can be argued that Nuremberg partook in pseudo-legislating international criminal laws, as pointed out earlier in this Note. *See supra* section III, A. Nevertheless, none of these predecessor international criminal tribunals could be said to legislate international criminal laws. As pointed out elsewhere in this Note, each of these predecessor tribunals, being tribunals that were created after the commission of the crimes, were relegated to adjudicating laws that stood at the time the alleged suspects committed the crimes. *See supra* section III, A-C. The ICC is not limited in this fashion, however, and can thus formulate laws that it will adjudicate in the future, regardless if they existed at the time the Rome Statute was initially created.

235. SADAT, *supra* note 200, at 11-12.

236. *Id.* at 263.

237. The Rome Statute's use of the term "[f]or purpose of this Statute" indicates that the criminal laws under the treaty are not customary international criminal laws, but laws specifically legislated for use by the ICC. Rome Statute, *supra* note 207, art. 6, 7(1), 8(2).

238. *See* SADAT, *supra* note 200, at 263.

239. BROOMHALL, *supra* note 59, at 68. "The former President of the [ICTY], Antonio Cassese, describes the choice in stark terms: either one supports the international rule of law, or one supports State sovereignty. The two are not, in his view, compatible." *Id.* at 56. Cassese's statement directly highlights the eternal conflict waged between the international rule of law and State sovereignty, and how this conflict is ever present in international law/politics/diplomacy. This idea will be addressed more fully later in this Note.

240. *Id.* at 67-68.

might, rather than advance the cause of international justice, actually produce definition of crimes that would be 'lowest common denominator' definitions far more restrictive than those generally believe to be part of customary international law..."[241] To squelch these worries, Article 10 was added, "[n]othing in this [Statute] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."[242] At first blush, Article 10 appears to permit the existence of two sets of equally universal international criminal law that differ from each other, one being the more restrictive Rome Statute[243] and the other being pre-existing customary international criminal law. However, as noted, customary international criminal law will continue to evolve; thus, Article 10 does not partition the Rome Statute from customary international criminal law, but instead is an admission that political compromises were made during the Rome Statute negotiations and these compromises are the floor, or the "minimum rules of conduct and [those outside the tribunal] (and the Court itself) must read it that way."[244] Consequently, Article 10 creates a "pick and choose" mechanism, whereby the parts of the Rome Statute that pair back on contemporary customary international criminal law are limited in application to the ICC, and the more progressive parts of the Rome Statute are its contributions to the development of customary international criminal law.[245] Furthermore, as customary international criminal law continues to develop in the future, Article 21 permits the ICC to use these developments to supplement its decision as a type of "gap filler":[246] "[t]he Court shall apply...where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict."[247] While the future will determine if the Rome Statute Framers made a mistake or were brilliant in allowing for the existence of a law outside of the Rome Statute, their recognition and subsequent action to detail the relationship between the Rome Statute and customary international criminal law shows a subjective belief on the part of the Rome Statute Framers that they were truly legislating a world criminal code.[248]

C. The Structure of the ICC and Its Jurisdiction to Adjudicate

The end result of the Rome Statute negotiations was the ICC, an international legal and judicial body unlike any other in history. The Rome Statute clearly was an unprecedented exercise of international prescriptive jurisdiction, and as a result,

241. SADAT, *supra* note 200, at 267.

242. Rome Statute, *supra* note 207, art. 10.

243. The ICC is universally applicable to all—regardless if an individual is from a State that has not ratified the Rome Statute—when a case is referred to the ICC from the U.N. Security Council.

244. SADAT, *supra* note 200, at 263. Sadat also states that "article 10 retains tremendous importance not as a rule of decision but as a principle of interpretation." *Id.*

245. *Id.* at 269. This idea is not foreign, for the Nuremberg Judgment echoed a similar sentiment in regards to the Nuremberg Charter when it said that the Charter was an "expression of international law existing at the time of its creation" while simultaneously "a contribution to international law." Judgment of Oct. 1, 1946, *supra* note 62, at 186, 216-17.

246. SADAT, *supra* note 200, at 270.

247. Rome Statute, *supra* note 207, art. 21(1)(b).

248. SADAT, *supra* note 200, at 271.

the ICC is the first international tribunal to possess prospective subject matter jurisdiction over any international crime, which in the ICC's case is jurisdiction over genocide,[249] crimes against humanity,[250] war crimes,[251] and aggression.[252] Yet, there are substantial limits placed on the ICC by the Rome Statute that make the ICC very different from a domestic court. The Rome Statute bestowed the ICC with limited temporal and personal jurisdiction, failing to give the ICC jurisdiction over past international crimes and jurisdiction over corporations or States.[253] The most significant restraint on the ICC is on its jurisdiction to adjudicate. Unlike any domestic court in any domestic jurisdiction, the Rome Statute does not allow jurisdiction to adjudicate to follow naturally from jurisdiction to prescribe.[254] Only in limited instances will the ICC be able to adjudicate the commission of an international crime(s) that the Rome Statute prescribed as internationally criminal. To illustrate the regimen created to determine when the ICC can exercise its jurisdiction to adjudicate, the first step will be to discuss the separate organs of the ICC and their roles, followed by a discussion on how the ICC's jurisdiction to adjudicate is triggered and the limits of the ICC's jurisdiction to adjudicate.

The ICC is divided into four main parts: The Presidency, the Judiciary, the Registry, and the Office of the Prosecutor.[255] The Presidency is primarily called upon to ensure the "proper administration of the Court, with the exception of the Office of the Prosecutor",[256] which includes managing the Judges in the Judiciary, deciding if an increase in Judges is necessary,[257] and anything else that the Rome Statute may in the future call the Presidency to do.[258] The Presidency is made up

249. Rome Statute, *supra* note 207, art. 6.

250. *Id.* at art. 7.

251. *Id.* at art. 8.

252. The crime of aggression or crimes against peace was not specifically defined under the Rome Statute, thanks in part to its highly controversial status. The crime of aggression is prescribed under the Rome Statute in theory. Rome Statute of the ICC, *supra* note 207, pmbl., art. 5(2). However, aggression will not become justiciable until it is defined pursuant to the Rome Statute's amendment procedures, which will be an ongoing, slow process for the ICC to undertake. Rome Statute, *supra* note 207, art. 121, 123; BROOMHALL, *supra* note 59, at 46-7; SADAT, *supra* note 200, at 134-8.

253. Rome Statute, *supra* note 207, art. 1, 11, 25(1).

254. For example, if a domestic jurisdiction prescribes murder as criminal, the adjudication of murder in that domestic jurisdiction by that domestic jurisdiction's judiciary will always occur. The ICC does not make such a smooth transition from jurisdiction to prescribe to jurisdiction to adjudicate, as will be described below.

255. Boller, *supra* note 63, at 282; *see* SADAT, *supra* note 200, at 86-98. While not specifically an organ of the ICC, there also exist the Assembly of State Parties, which is charged with general oversight of the ICC's "operations and functioning", including management and budget oversight, changes to amount of judges, potential amendments to the Rome Statute, and alterations to ICC's Criminal, Procedural, and Evidentiary rules. Rome Statute, *supra* note 207, art. 112(2)(a-b, d-e); SADAT, *supra* note 200, at 98-99. A decision made by the Assembly of the Parties is made by consensus, but if there is no consensus, a decision is made by either supra-majority or simple majority depending on the type of decision. Rome Statute, *supra* note 207, art. 112(7).

256. Rome Statute, *supra* note 207, art. 38(3)(a)

257. *Id.* at art. 36(2).

258. *Id.* at art. 38(3)(b).

of full time Judges elected by a majority of their peers.[259]

The Judiciary, or what the Rome Statute identifies as the "Appeals Division, a Trial Division and a Pre-Trial Division",[260] is made up of eighteen Judges from signatory State Parties to the ICC, with strict regulations on the term limits, election procedure, moral character, and geographic makeup of the Judges.[261] Selection of Judges also includes a consideration of an equitable geographic distribution of Judges and legal systems, equal distribution of gender,[262] their special expertise in specific areas of concern,[263] competence and experience in criminal law and procedure, and competence and experience in international law, particularly humanitarian law and law of human rights. [264] Each Judge within the Judiciary serves a non-renewable nine year term,[265] which was agreed upon to avoid the politicization of Judge selections. However, some argue the term-limit diminishes the legitimacy, institutional memory, and competence of the Judiciary.[266] Once the Judiciary is set, the Judges are tasked with organizing themselves within the Appellate, Trial, and Pre-Trial divisions.[267] While almost all legal systems are familiar with Trial and Appellate divisions, the Pre-Trial division is a civil law concept that is "actively involved in the organization and supervision of the case by the Prosecutor during the pre-trial phase",[268] which, among other things, includes deciding whether reasonable evidence exist to proceed with an investigation or begin a prosecution,[269] hearing challenges to admissibility or jurisdiction of the ICC,[270] preserving evidence, protecting national security information,[271] and confirming charges for admittance to Trial division.[272]

The Registry, while handling the operation of the ICC with respect to non-legal matters,[273] has immensely important responsibilities that have direct impact on ICC cases.[274] Chief among those responsibilities is the selection and facilitation

259. *Id.* at art. 35(2), 38.

260. *Id.* at art. 34(b).

261. *Id.* at art. 36(3); Boller, *supra* note 63, at 282-283.

262. Rome Statute, *supra* note 207, art. 36(8)(a).

263. *Id.* at art. 36(8)(b).

264. *Id.* at art. 36(3)(b)(i-ii).

265. *Id.* at art. 36(9)(a).

266. SADAT, *supra* note 200, at 87-88. Another contentious issue is the power to issue majority and minority judicial opinions by both Trial and Appeals Chambers, and separate opinions by the Appeals Chambers, which the ICC Judiciary does have. Rome Statute of the ICC, *supra* note 207, art. 74(5), 83(4). A good overview of the arguments surrounding this issue are found in Sadat's book. SADAT, *supra* note 200, 88-90.

267. Rome Statute, *supra* note 207, art. 38(1).

268. SADAT, *supra* note 200, at 91.

269. Rome Statute, *supra* note 207, art. 15(4), 53(2).

270. *Id.* at art. 15(3), 17-19, 57(2).

271. *Id.* at art. 57(3)(c).

272. *Id.* at art. 61.

273. *Id.* at art. 43(1).

274. SADAT, *supra* note 200, at 96. Registrars in the ICTY and ICTR manage the detention units, maintain court records, handle all language related services, and control the Tribunals' budget. M&S YUGO, *supra* note 79, 168-70; M&S RWANDA, *supra* note 123, at 396-98.

of defense counsels for suspects.[275] Registry is controlled by a full-time, elected Registrar, and the possibility does exist for the appointment of a Deputy Registrar.[276]

The highly controversial Office of the Prosecutor, a separate entity from all other ICC organs,[277] has a Prosecutor and Deputy Prosecutor that are subject to very similar membership requirements and election procedures as the Judiciary.[278] The main purpose of the Office of the Prosecutor is to make determinations as to the appropriateness of exercising the ICC's jurisdiction to adjudicate:[279] "[t]he Prosecutor is responsible for receiving referrals and substantiating information on crimes within the jurisdiction of the [ICC], for examining those referrals and for conducting investigation and prosecutions."[280] There are three avenues from which the Prosecutor can commence an investigation or prosecution: referrals from a State party, referrals from the U.N. Security Council, or investigations and prosecutions started *proprio motu* (on his or her own motion).[281] Bestowing State Parties and the U.N. Security Council with substantial power to determine when and where the Prosecutor acts is clearly inserted in the Rome Statute to appease the sovereignty of States;[282] however, allowing the Prosecutor, in limited circumstances, to initiate investigations/prosecutions on their own proves that the Rome Statute Framers understood that political, economic, and other non-legal reasons would inhibit States and the U.N. Security Council, in many instances, from referring cases to the ICC.[283] Furthermore, an independent Prosecutor would bring legitimacy and effectiveness to the ICC and give an incentive to States to

275. SADAT, *supra* note 200, at 98.

276. Rome Statute, *supra* note 207, art. 43(4-5).

277. *Id.* at art. 42(1).

278. *Id.* at art. 42(4); Boller, *supra* note 63, at 283.

279. As alluded to elsewhere in this Note, jurisdiction to prescribe and jurisdiction to adjudicate are related, but different. *Supra* note 254 and accompanying text. Using the ICC as an example, jurisdiction to prescribe certain conduct as internationally criminal revolves around this Note's prior discussion on universal international jurisdiction, or the ICC's jurisdiction to deem particular conduct as internationally criminal wherever it takes place. *Supra* note 220 and accompanying text. The subsequent conversation here discusses whether the ICC can/should adjudicate an individual(s) who has violated the Rome Statute. Hence, jurisdiction to prescribe is the *legislative* power to make certain conduct criminal, and jurisdiction to adjudicate is the *judicial* power to judge whether certain laws have been violated. The theoretical jump from jurisdiction to prescribe to jurisdiction to adjudicate is not so immediate under the ICC regime in comparison to domestic jurisdiction, because under domestic regimes, jurisdiction to adjudicate follows naturally from jurisdiction to prescribe; only restricted by reasonableness. *Supra* note 254 and accompanying text. However, under the ICC, the State consent regime, the principle of complimentarity, and the principle of *neb is in idem* are three ways the ICC is restricted from adjudicating Rome Statute crimes that the ICC has prescriptive jurisdiction over and could theoretically prosecute. SADAT, *supra* note 200, at 112.

280. SADAT, *supra* note 200, at 95; Boller, *supra* note 63, at 283.

281. Rome Statute, *supra* note 207, art. 13.

282. Additionally, the U.N. Security Council option was included to take care of situations where international crimes occurred exclusively domestically, and that certain State was either not party to the Rome Statute, was a State Party that refused to adjudicate the case domestically, or a State Party that refused to refer a situation to the ICC. *See* BROOMHALL, *supra* note 59, at 207.

283. BROOMHALL, *supra* note 59, at 78-82; SADAT, *supra* note 200, at 112-19.

initiate their own investigations or prosecutions of Rome Statute violations.[284]

The manner in which any "situation" [285] is referred to the Prosecutor by a State Party or U.N. Security Council or if the case is started by the Prosecutor *proprio motu*[286] will determine which jurisdictional rationale to adjudicate is implicated and the processes that the Prosecutor must follow in order to commence an investigation. If a situation is referred to the Office of the Prosecutor by a State Party or initiated *proprio motu*, the Prosecutor's jurisdiction to adjudicate requires implicit State Party consent, in that either the territorial State in which the suspected violations of the Rome Statute occurred or the State of the suspect's nationality is a State Party to the Rome Statute or has consented *ad hoc* to ICC's jurisdiction.[287] While universal jurisdiction to adjudicate is not completely eliminated from the justification of the Prosecutor's jurisdiction to adjudicate situations or cases referred by State Parties or started by *proprio motu* motion, [288] the Prosecutor's jurisdiction to adjudicate State party referrals and *proprio motu* motions is "layered... [with] a State consent regime based on two additional [] principles of jurisdiction: the territorial principle and the nationality principle", considered the two most fundamental jurisdictional principles of criminal law.[289]

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284. BROOMHALL, *supra* note 59, at 79-80; 86. Considering that the ICC makes the final decision on its jurisdiction to adjudicate, incentives include the avoidance of adverse international media exposure, diplomatic hardship, a duty to cooperate with the ICC, and legitimizing domestic legal system.

285. To protect the independence of the Prosecutor and legitimacy of the ICC, situations, not cases or suspects, are referred to the Office of the Prosecutor by a State Party or U.N. Security Council. *Id.* at 79-80.

286. If an investigation is started by a *proprio motu* motion of the Prosecutor, it is not limited to "situations", because this allows victims and interested parties to "avail themselves of the Court". *Id.* at 80.

287. Rome Statute, *supra* note 207, art. 12(2); BROOMHALL, *supra* note 59, at 80. It is an implicit consent from the State Party, because upon ratification of the Rome State domestically, the State Party has proactively and explicitly accepted the jurisdiction of the ICC over the crimes specifically enumerated and defined in the Rome Statute without the availability of reservations. Rome Statute, *supra* note 207, art. 5-9, 12(1), 120.

288. Universal jurisdiction plays a role in not only the ICC's jurisdiction to *prescribe* certain conduct—as discussed above in section on universal international jurisdiction—but also in the Prosecutor's jurisdiction to *adjudicate* situations/cases referred to the Office of the Prosecutor by a State Party or by *proprio motu* motion. *Supra* note 220 and accompanying text. In other words, universal jurisdiction is not completely excluded from an ICC case that started from a State Party referral or from a Prosecutor's *proprio motu* motion, because the States Parties—even absent their presumed territorial and nationality jurisdiction to adjudicate such crimes—still have universal jurisdiction to adjudicate genocide, crimes against humanity, etc., as these crimes are *jus cogens*, and punishable by all States pursuant to customary international criminal law. Hence, a State Party that refers a case or a Prosecutor that starts their own investigation could, theoretically, need not find that the crimes occurred on the territory or by a national of a State Party in order to justify the adjudication, but this requirement was artificially imposed pursuant to the Rome Statute to ease the concerns of some States during negotiations.

289. SADAT, *supra* note 200, at 116-17; BROOMHALL, *supra* note 59, at 80-81. Broomhall also argues that, practically speaking, an additional precondition exist for the ICC to exercise its jurisdiction to adjudicate, that being the approval of the U.N. Security Council in situations referred to the ICC via State Party or by Prosecutor *proprio motu* motions. Under Article 16, no investigation or prosecution may be commenced or continued if the U.N. Security Council passes a Chapter VII resolution

In contrast, a referral from the U.N. Security Council does not require any explicit or implicit consent from any State Parties to justify the Prosecutor's jurisdiction to adjudicate, because the U.N. Security Council, acting pursuant to its Chapter VII powers to protect international peace and security,[290] can refer a situation to the Office of the Prosecutor that has occurred on the territory of a State or non-State Party and/or by a national of a State or non-State Party. Under U.N. Security Council referrals, the Prosecutor has jurisdiction to adjudicate anyone, anywhere in the world.[291] So, it can be said that situations investigated or prosecuted by the Prosecutor pursuant to a U.N. Security Council referral is universal jurisdiction to adjudicate in its purest form.[292]

Turning to the varied procedures that the Prosecutor must follow in regard to investigations and prosecutions, referrals of situations to the Office of the Prosecutor by State Parties or by the U.N. Security Council must overcome a lower threshold in order for the Prosecutor to initiate an investigation or prosecution, in that the Prosecutor must only establish that a reasonable basis exist for an investigation or prosecution to commence pursuant to Article 53. [293] Moreover, State Parties, the U.N. Security Council, and even the Pre-Trial Chamber in limited circumstances, can request reconsideration of situations referred to the Prosecutor that the Prosecutor subsequently concluded were void of a reasonable basis to investigate or prosecute.[294] *Proprio motu* investigations or prosecutions, on the other hand, must adhere to a much stricter procedure whereby the Pre-Trial Chambers "closely supervise cases in which the Prosecutor exercises his or her *proprio motu* investigative powers."[295] In addition to the requirement that the Prosecutor must find a reasonable basis to proceed with an investigation or prosecution pursuant to Article 53, the Prosecutor must apply for the Pre-Trial Chamber's approval for an investigation, which gives rise to further inquiry into the facts and law of the case by the Judiciary, and only after approval by the Pre-Trial Chamber may the Prosecutor proceed with the investigation or initiate a prosecution.[296] The more stringent procedure put upon the Prosecutor in respect to

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requesting the ICC to withdrawal from adjudicating a particular situation. However, this requires an affirmative, unified action by the overly political, divergent U.N. Security Council in order to *stop* a potential or ongoing investigation/prosecution. Plus, there still is not a literal requirement that the Office of the Prosecutor must receive authorization from the U.N. Security Council prospectively in order to adjudicate a situation. Rome Statute, *supra* note 207, art. 16; BROOMHALL, *supra* note 59, at 81-82.

290. Rome Statute, supra note 207, art. 13(b). The Security Council can only refer a situation pursuant to their Chapter VII powers to protect international peace and security, not pursuant to any other powers bestowed to the U.N. Security Council by the U.N. Charter. BROOMHALL, *supra* note 59, at 79.

291. SADAT, *supra* note 200, at 116-17.

292. *Id.* at 116-17.

293. Rome Statute, *supra* note 207, art. 53(1-2).

294. *Id.* at art. 53(3).

295. SADAT, *supra* note 200, at 95.

296. Rome Statute, *supra* note 207, art. 15. Broomhall believes the structural differences between referrals from a State Party and U.N. Security Council vs. cases started *proprio motu* by the Prosecutor boils down to the difficulty the Prosecutor has in obtaining Article 54 powers, which include the power

proprio motu investigations and prosecutions resulted from the fear that despite the benefits of an independent Prosecutor, political motivations and other non-legal impulses could contaminate the Prosecutor's judgment, thus outside checks on the Prosecutor's *proprio motu* powers were deemed necessary.[297]

Overarching the entirety of the ICC's jurisdiction to adjudicate is the principle of complimentarity, a concept constructed by the Rome Statute Framers.[298] The principle of complimentarity is not to be confused as meaning concurrent. Rather, complimentarity defines the admissibility of a situation or case to the ICC and sets the ground rules for ICC's jurisdiction to adjudicate in a State- centric world where a State or multiple States and the ICC will possess simultaneous jurisdiction to adjudicate a situation or case.[299] The ICC may exercise its jurisdiction to adjudicate a situation only if: 1.) a State that has jurisdiction over a situation "is unwilling or unable genuinely to carry out the investigations" or a State with jurisdiction over the situation "decided not to prosecute" it; 2.) the situation is of "sufficient gravity" for the ICC to adjudicate and; 3.) the alleged suspect has not already been tried for the same conduct at issue.[300] Particular to situations referred by State Parties and prosecutions or investigations commenced *proprio motu*,[301] if the Prosecutor begins an investigation, the Prosecutor must notify the State or States that "would normally exercise jurisdiction over the crimes concerned" of a pending ICC investigation, and if a State contacted ask for the Prosecutor to defer, the Prosecutor must defer the investigation barring Pre-Trial Chamber authorization to the contrary.[302] However, the Prosecutor may revisit a deferred investigation if there is a "significant change of circumstances based on the State's

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to make cooperation requests upon State Parties. BROOMHALL, *supra* note 59, at 79, n. 41.

297. BROOMHALL, *supra* note 59, at 79-80.

298. To reiterate in different words, to understand complimentarity correctly—and the whole ICC's jurisdiction to adjudicate for that matter—, remember that there is jurisdiction on one hand and admissibility on the other hand, within the context of the ICC. The ICC can have jurisdiction over a situation, but complimentarity will make the ICC's jurisdiction inadmissible. However, no situation would ever be admissible without the ICC having jurisdiction over it. Sadat gives a great discussion on jurisdiction and admissibility concepts under the ICC. SADAT, *supra* note 200, at 122-27.

299. *Id.* at 119. From the beginning of the Rome Statute, it is said that the ICC is "complimentary" to domestic/national jurisdictions, and thus the principle of complimentarity conceptually defines when ICC jurisdiction to adjudicate is permissible or if a State has primacy of jurisdiction. Rome Statute, *supra* note 207, pmbl., art.1.

300. *Id.* at art. 17(1)(a-d); SADAT, *supra* note 200, at 119. A detailed discussion on the principle of complimentarity and also how complimentarity gives incentives for States to adjudicate international crimes is done by Broomhall. BROOMHALL, *supra* note 59, at 86-93.

301. The Rome Statute is vague on how the principle of complimentarity relates differently, if at all, to situations referred to the Prosecutor via a State Party, U.N. Security Council, or cases started *proprio motu*. While Article 17 on complimentarity does not refer to a distinction between the three types, Article 18 on complimentarity only applies to *proprio motu* or State Party referral investigations/prosecutions. Rome Statute, supra note 207, art. 17-18. Sadat suggests that maybe complimentarity is bypassed in situations referred to the Prosecutor by the U.N. Security Council, and if not bypassed, the situation is on the "'fast track'" to investigation and potential prosecution, because Article 18 does not apply. SADAT, *supra* note 200, at 123. Boller, on the other hand, states that the Prosecutor is under no deferral obligations or the principle of complimentarity if the situation is referred to the Prosecutor via U.N. Security Council. Boller, *supra* note 63, at 287.

302. Rome Statute, *supra* note 207, art. 18(1-2).

unwillingness or inability to carry out the investigation."[303] The hopeful end result of having a procedure of complimentarity is that the investigation or prosecution of international crimes will occur one way or another, because either a sovereign State will take control of its opportunity to head up an investigation and prosecution of an international crime or the ICC will step into its place by exercising its jurisdiction to adjudicate the criminal conduct.

As highlighted from this Note's look at the ICC, many of the criticism lodged against the *ad hoc* tribunals are not applicable to the ICC. Of most importance, the *ex post facto* institutional criticisms that dealt with the creation of *ad hoc* tribunals, or tribunals post-crime, is erased with the permanent ICC. First, it seemed illogical to put in such a tremendous amount of time, effort, and money to create the ICTY and ICTR, all for the adjudication of international crimes that occurred in individual conflicts of the past, rather than putting that time, money, and effort into creating a tribunal that would *prospectively* handle *all* future international crimes under its jurisdiction. However, this is exactly what the Rome Statute and ICC did, thus avoiding this criticism altogether. Second, having a permanent international criminal court validates and solidifies the international community's commitment to adjudicate instances of genocide, crimes against humanity, and war crimes.[304] Lastly, making the ICC a permanent criminal tribunal confers legitimacy on its future actions and fairness to potential defendants, because a permanent institution alerts potential international criminals that the world is ready to punish them if they choose to commit international crimes.

The ICC possesses additional advantages over its *ad hoc* predecessors. Although the ICC has not handled enough cases yet to know its true speed and efficiency, it will nevertheless surely be able to adjudicate crimes, from time of commission to judgment, faster than the ICTY and ICTR because, unlike the *ad hoc* tribunals, the ICC is already established. In contrast, bringing justice to Rwanda and to the former Yugoslavia was delayed while the protracted political and logistical effort to create the *ad hoc* tribunals was underway, which unreasonably elongated the overall time it took these institutions to handle international criminal violations. Along the same line, lack of cooperation severely affected the ICTY's ability to function as a judicial entity, and the Rome Statute Framers addressed this issue by incorporating into the Rome Statute an elaborate international cooperation regime.[305] The creation of the Rome Statute itself, a clear and uniform criminal code that the ICC must use primarily in its court rooms,[306] spares the ICC of dealing with the legality problems that the *ad hoc* tribunals were

303. *Id.* at art. 18(3).

304. Of course, this potentially will include the world's commitment to adjudicate instances of aggression, but as stated earlier, the ICC has some work to do on defining aggression before the ICC can adjudicate cases of aggression. *Supra* note 252.

305. *See* Rome Statute, *supra* note 207, art. 86-111. However, despite this enforcement mechanism put in place, enforcement is still a weakness for the ICC as will be discussed later in this Note.

306. As discussed earlier in this Note, the use of customary international criminal law by the ICC remains an option; however, such use is not to be the primary law applied in the ICC, and is only supplementary. *Supra* section IV. B.

forced to face, as highlighted earlier. For instance, the ICC, unlike the ICTY and ICTR, will not be compelled to use confusing, ill-created customary international criminal law. In addition, the ICC will not have to decipher if certain violations of conventional international criminal laws is a criminal offense, or just illegal breaches. For the foregoing reasons, the ICC, as it presently stands, is without question a vast improvement over the *ad hoc* tribunals.

D. The Flaws of The ICC: Is the ICC the Answer?

The amazing amount of perseverance and cooperation necessary to create the Rome Statute resulted in an enormous international accomplishment when the ICC became reality on July 1, 2002.[307] Yet, it would be a disservice to the world's aspiration for a fully functioning, coherent international criminal system to call the ICC the answer. Substantively, structurally, and of gravest concern, conceptually, the ICC faces an uphill struggle that will not be overcome without either a revolution in the international legal order or momentous alterations to the ICC's structure. The struggle that awaits the ICC stems from two factors: internal defects within the ICC and the external realities of the Westphalian world order.

Internally, the ICC must confront some troubling issues. Of chief concern is that justifying the ICC's ability to go from "jurisdiction to prescribe" to "jurisdiction to adjudicate" is a complicated mess in comparison to domestic courts. Of course, this complicated mess stems from the self-inflicted negotiated compromises made between those who supported sovereignty and those who supported the international rule of law. However, the principle of complimentarity, the multitude of jurisdictional preconditions, and all the other jurisdictional merry-go-rounds in the Rome Statute obscures when the ICC can adjudicate the subject matter of the Rome Statute or when it must defer to national proceedings.[308] This ultimately will impair the ICC's ability to operate without controversy.[309] In this respect, the ICC is a setback from its *ad hoc* tribunal predecessors, where both the ICTY and ICTR had primacy of jurisdiction over national proceedings, which inevitably means that the ICC will have to deal with significantly more jurisdictional battles than both *ad hoc* tribunals combined.[310] The Rome Statute does not provide any countermeasures to State Parties that abuse the complimentarity system, whereby a State Party can feasibly launch a bogus investigation of an alleged international crime in order to deflect ICC intervention and/or to prevent any judicial action from taking place at all.[311] Additionally, the

307. *Establishment of the Court*, *supra* note 3.

308. See BROOMHALL, *supra* note 59, at 83; SADAT, *supra* note 200, at 110-11, 114 ("Yet the Statute does not propose a bright line test for sorting the international from the national; that is, there is no 'interstate commerce clause requirement' such as we find in U.S. federal criminal law, "). Amazingly, the Rome Statute's most explicit indication of when the ICC possesses jurisdiction to adjudicate is where the Rome Statute vaguely says that the ICC can adjudicate "the most serious crimes of concern to the international community as a whole." Rome Statute of the ICC, *supra* note 207, art. 5(1).

309. *See* BROOMHALL, *supra* note 59, at 83; SADAT, *supra* note 200, at 110-11, 114.

310. SADAT, *supra* note 200, at 85, 280.

311. *Id.* at 124. Although the Rome Statute states that the State Party must "genuinely" be unwilling or unable to prosecute in order for the ICC to adjudicate, there is question as to what

confusion surrounding when the ICC has jurisdiction to adjudicate is another reason supporting the conclusion that the ICC may be an unattractive forum to adjudicate international crimes. Limited financial resources, an inexperienced judicial system, potential adjudication away from the territory of the crime, and the inevitable difficulties in extraterritorially gathering evidence, running investigations, and apprehending suspects are all extremely valid reasons against bringing a case to the ICC.[312]

The most troubling internal problem with the ICC is its jurisdiction to enforce,[313] which "is paltry, at best,..."[314] Unlike the ICC's jurisdiction to prescribe and adjudicate, the ICC's jurisdiction to enforce is far from ground-breaking, for the ICC depends almost completely on State Party cooperation to fulfill even the most basic judicial functions.[315] While there is nothing theoretically wrong with having a State-dependent enforcement structure, the ICC gives little motivating incentives to State Parties to comply or harsh penalties for not complying, and consequently, the ICC will go through the same enforcement hardships that afflicted the *ad hoc* tribunals.[316] Given that States are afforded enough discretion and power to undercut the ICC's enforcement mechanism freely and purposefully - if so desired-, the ICC's jurisdiction to enforce is uncomfortably at the whim of sovereign nations and ill-fated by design.[317]

The blame for all of these internal structural and substantive problems belongs with the Rome Statute Framers who attempted to achieve compromise between what the former President of the ICTY believes are completely

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"genuinely" means and if the ICC is able to prove one way or another if the State Party is "genuinely" unwilling or unable to adjudicate themselves? Rome Statute, supra note 207, art. 17(1)(a-b); *see* SADAT, *supra* note 200, at 124.

312. SADAT, *supra* note 200, at 114.

313. Jurisdiction to enforce, in this Note, should be construed very broadly. It includes enforcing anything and everything that would come up during an investigation, pre-trial process, and/or trial. Anything, big or small, that a tribunal must enforce in order to work is encompassed under the term "jurisdiction to enforce".

314. SADAT, *supra* note 200, at 11.

315. The ICC lacks an independent police force, and accordingly, cannot undertake the most basic judicial operations without State Party cooperation, including execute arrest warrants, freeze assets, order the production of documents, force witness to appear, issue subpoenas, impose penalties on State Parties that do not comply with the Rome Statute, or undertake judicial orders on the territories of State Parties, to name a few. SADAT, *supra* note 200, at 120-22; BROOMHALL, *supra* note 59, at 151-162 (giving detailed insight in the *ad hoc* tribunal enforcement problems, the enforcement mechanism of the ICC, and concluding that the enforcement mechanism depends heavily on cooperation and is subject to the old world order of sovereignty); Cassese, *supra* note 197, at 435 ("The second shortcoming is more serious. Like any other international criminal tribunal, the ICC relies heavily upon state cooperation, to the extent that it might be crippled in the absence of such cooperation.").

316. The ICC can look simply to the troubles the ICTY and ICTR experienced to foretell the ICC's future in this regard, because both *ad hoc* tribunals were also dependent on sovereign States for enforcement measures. BROOMHALL, *supra* note 59, at 151-162.

317. Stephan Rademaker, *Unwitting Part to Genocide:The International Criminal Court is Complicating Efforts to Save Darfur,* WASH. POST, Jan. 11, 2007, at A25 (illustrating the power of a State—China in this instance—to frustrate an ICC's international criminal investigation in Sudan, all in the name of protecting China's domestic and foreign interest in Sudanese oil).

incompatible interests: sovereignty and international rule of law. [318] As the ICC grows older and as these internal issues slowly develop into mammoth impediments, it will become even more evident that the Rome Statute Framers should have charted a different course for the ICC, specifically one that did not include unworkable compromises.

Perhaps the most egregious misstep of the Rome Statute Framers was in their misunderstanding of how a permanent international criminal court should *conceptually* be constructed in light of the undeniable external reality of the Westphalian international world order.[319] As a consequence of this misunderstanding, the ICC is ill-equipped for success in our State-centric world of international law because it frustrates the very essence of sovereignty, and accordingly, the odds are not in its favor that it can survive in this Westphalian world order.[320]

Doubts exist as to whether the Westphalian State-centric international world order still persists as it once did. There is a popular belief that the impact of globalization, the expanding recognition of human rights, and the growing legitimacy of international law has elevated the influence of multinational corporations and non-governmental organizations to new heights, and correspondingly, has chipped away at the authority of sovereign States on the world stage.[321] Similarly, another common conception is that the end of the Cold War brought about a new found willingness on the part of the international community to use the law as a preferred method of fighting international crime, even if this means violating the Cold War maxim that no one intervenes into the internal affairs of a sovereign State.[322] These beliefs, while true to a certain extent,

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318. Cassese, *supra* note 228, at 6-9 (stating that either one supports sovereignty or one supports international rule of law, for one cannot support both); *see* BROOMHALL, *supra* note 59, at 56, 68 (discussing the compromise made between State sovereignty and the international rule of law/effectiveness during the Rome Statute negotiations).

319. For purposes of this Note, Westphalian world order and State-centric world order are one and the same. Both refer to the historical and present-day system of world affairs in which sovereign States dominate everything, including international law, international diplomacy, and international politics. *Supra* note 9.

320. It should be noted that this point, and other similar ones, are not endorsements of unabashed sovereignty. Rather, one of the premises of this Note is that sovereignty still rules, and likely will always have a strong role in international affairs for the foreseeable future. Hence, an international criminal law system should construct itself around this undeniable reality.

321. It is popular conception, in and out of the legal world, that the power of sovereign States in the world is slowly eroding. This sentiment can be found in many different sources across the spectrum. *See generally* NON-STATE ACTORS IN WORLD POLITICS (Daphné Josselin & William Wallace eds., 2001); Christyne J. Vachon, *Sovereignty Versus Globalization: The International Court of Justice's Advisory Opinion on the Threat or Use of Nuclear Weapons*, 26 DENV. J. INT'L L. & POL'Y 691 (1998); Ken Wiwa, Commentary, *Without Borders: In a World With No Borders, The Best-Connected Nation is King*, GLOBE AND MAIL (TORONTO), Sept. 27, 2003 at A27; Jeff Vail, *The New Map: Terrorism and the Decline of the Nation-State in a Post-Cartesian World*, http://www.jeffvail.net/thenewmap.doc (last visited Oct. 21, 2007).

322. BROOMHALL, *supra* note 59, at 185-86 ("The end of the Cold War brought with it a change in the way that issues were articulated, given priority, and responded to at the international level . . . More to the point, the collapse of the system of superpower confrontation has allowed human rights to take a

are overstatements and mischaracterizations of reality on the ground, for the prevailing international legal structure remains State-centric:

> The end of the Cold War... has led to some attenuation of the link between territorial integrity and international stability, and has supported an increased willingness to consider intervention and the altering of borders... At the same time, the importance of the Cold War's end as a matter of *legal* change should not be exaggerated. The conditions inherent in the post-War order (dividing prohibitions and their enforcement, norms and behavior, and ultimately law and politics) have not themselves ceased to exist since 1989. Decisions in interpreting or applying the law, as well as action authorized through the Security Council, the (ICC) Assembly of State Parties, or NATO, unilaterally or otherwise, will continue to depend significantly on the auto-interpretation of self-interested States and on their calculus of national strategic, economic, and political costs and benefits... The same can be said of the "decline of sovereignty" and globalization. The term 'globalization' may be the 'the cliché of our times'... While globalization does have certain power in framing analysis of undoubtedly real transformations in a number of areas... the "distinctive attributes of contemporary globalization... by no means simply prefigures the demise of the nation-state or even the erosion of state power". On the contrary, "processes of globalization are closely associated with, although by no means the sole cause of, a transformation or reconstitution of the power of the modern nation-state."... The better view is that the foreseeable future does not hold the realistic prospect of a significant replacement or realignment of the institution of sovereignty, at least in any sense relevant to the establishment of the preconditions for regular, impartial enforcement of international criminal law.[323]

Of particular relevance to international criminal law, the fact that ultimate power still rest exclusively within the control of sovereign States lend itself to the conclusion that "there are few signs that the tension between the 'international order' rationale of international criminal law and the State-centric character of the 'Westphalian' system is likely to abate in the foreseeable future."[324] Specifically, sovereign States still hold onto two powers that disrupt the proper and effective implementation of international criminal law: sovereign States maintain a

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more prominent place in the discourse and the practice of States and international organizations . . . The increasing prominence, expansion, and refinement of international criminal law, and the project establishing an ICC . . . were also facilitated by this change.")

323. *Id.* at 184-88 (footnotes omitted); *see also* Gene M. Lyons & Michael Mastanduno, *State Sovereignty and the International Intervention: Reflection on the Present and Prospects for the Future, in* BEYOND WESTPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION, 250, 250-51 (1995); Duncan B. Hollis, *Why State Consent Still Matters – Non-State Actors, Treaties, and The Changing Sources of International Law,* 23 BERKELEY J. INT'L L. 137, 145-74 (2005).

324. BROOMHALL, *supra* note 59, at 58.

"'monopoly on legitimate force'" and; enjoy the freedom to make legal decisions based solely upon non- or extra-judicial factors.[325]

As discussed elsewhere, the jurisdiction to enforce, or said simply, the ability to implement judicial decisions, to use military force, and to police other States remains in the hands of sovereign States, not the international community.[326] Furthermore, sovereign States freely make critical decisions on international criminal matters based upon "diplomatic, economic, strategic, and 'purely political'" considerations, rather than applying international criminal law objectively and justly. Without an international constitution that divides powers among States, a large majority of the "legislative, executive, and adjudicative functions" exercised in the international arena rest within "the discretion of States."[327] Until it can be said that the decision-makers on international criminal issues are reasonably impartial and predictable, and possess the requisite and unequivocal force to back up their decisions, any international criminal system must come to terms with "the State-centric character of the 'Westphalian' system"[328]

Taking into account the continued domination of the State-centric model of international law, the conceptual blunder committed by the Rome Statute Framers becomes more apparent. The Rome Statute Framers assumed that the only way to combat international crime was to convince sovereign States to agree upon the creation of a completely independent international organization that would have jurisdiction over international crimes, a jurisdiction traditionally under sole possession of sovereign States. In other words, the Rome Statute Framers shared the popular belief that the promotion of international rule of law can only occur at the expense of sovereignty. While the logic of this idea is not in itself controversial or unworkable in a perfect world, it is an idea that simply will not work in a State-centric world because it upsets the very core of sovereignty.

Nowhere is this sentiment better expressed than the U.S. stance on the ICC. The U.S. views the mere existence of the ICC as an abrogation of its sovereign independence, mainly because the ICC possesses a power in international criminal

325. *Id.* at 58, 60.

326. *Id.* ("In fact, significant delegations of decision-making authority in vital areas of the policing, security, and military functions of States are not typically made in international law."). Even international organizations set up to police others States, such as the U.N. and NATO, do not make truly international decisions on the actions of other States. Rather, these international entities are mechanism whereby Member States to these organizations exercise their powers behind the veil of an international organization as a means to mask their decisions of other States. *Id.* at 60.

327. *Id.*

328. *Id.* at 58. Broomhall concludes that if the enforcement of international criminal law intrinsically means "the revision" of the State-centric Westphalian world order, than "it would require a deep change in the international order, either through a marked decline in (or delegation of) sovereignty, or through a substantial convergence of interests among States (giving rise, for example, to an international police authority)." *Id.* Such drastic events are highly unlikely to happen, either today or in the foreseeable future. So, that is where the Roaming ICC proposal comes into play, because it brings about the enforcement of international criminal law without the need for such drastic events such as these to occur.

jurisdiction—albeit extremely limited—that the U.S. believes only sovereign States are meant to possess.[329] Specifically, the U.S. believes that allowing for the existence of an entity that is entirely independent from the sovereignty of the U.S. and permitted to adjudicate international crimes takes away a piece of U.S. sovereignty.[330] The U.S. would rather have sovereign nations, on their own, be responsible for adjudicating international crimes, or allow sovereign nations the opportunity to create *ad hoc* tribunals when needed, as the U.S. proposed should be done in Darfur, Sudan.[331] Yet, given that the ICC does have jurisdiction over international criminal activity and that the ICC's international criminal jurisdiction does come at the cost of sovereign States being unable to practice international criminal jurisdiction in limited circumstances, this fuels the U.S.' perception of the ICC as an unbridled foreign tyrant that if given one ounce of power, it will grow to encroach on the sovereignty of all States.[332] The legitimacy of this perception is not an issue, for the reality of the ICC slowly destroying the U.S.' or any other nation's sovereignty is beyond comprehension.[333] Nonetheless, as demonstrated by

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329. Prior to becoming the U.S. Ambassador to the United Nations, John Bolton spoke on behalf of the U.S. Department of State on the topic of the ICC, stating:

[f]or a number of reasons, the United States decided that the ICC had unacceptable consequences for our national sovereignty. Specifically, the ICC is an organization whose precepts go against fundamental American notions of sovereignty, checks and balances, and national independence. It is an agreement that is harmful to the national interests of the United States, and harmful to our presence abroad.

See The United States and the International Criminal Court, U.S. Dep't of State, Nov. 14, 2002, http://www.state.gov/t/us/rm/15158.htm [hereinafter Bolton Speech].

330. *Id.*

331. Fact Sheet, *infra* note 334 (trumpeting the use of *ad hoc* tribunals as an option to the ICC). Without a doubt, the U.S. is infatuated with the concepts of *ad hoc* tribunals. Despite it being common knowledge that *ad hoc* tribunals are costly, inefficient, and jurisdictionally unsound, the U.S. continues to run against prevailing world opinion that embraces a permanent international criminal court. This was demonstrated when the U.S. proposed for an UN resolution to create an *ad hoc* tribunal for the international crimes occurring in Darfur, Sudan even though the majority of the UN Security Council voted to refer the Darfur, Sudan situation to the ICC. U.N. SCOR, 60th Sess., 5158d mtg. at 3, U.N. Doc. S/PV.5158 (Mar. 31, 2005), *available at* http://www.iccnow.org/documents/PVs_1593_DarfurReferral_31March05.pdf; WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 5 (2006).

332. *See* Bolton Speech, *supra* note 329 ("[O]ne might assume that the ICC is simply a further step in the orderly march toward the peaceful settlement of international disputes, sought since time immemorial. But in several respects, the court is poised to assert authority over nation states, . . . Never before has the United States been asked to place any of that power outside the complete control of our national government without our consent."); Anne K. Heindel, *The Counterproductive Bush Administration Policy Toward the International Criminal Court*, 2 SEATTLE J. SOC. JUST. 345, 362-63 (2004)(documenting the vehement words of Undersecretary of State for Arms Control and International Security John Bolton that the ICC will destroy U.S. constitution, and that the ICC is a risk to U.S. sovereignty).

333. Personally, this Note's author believes that countless human rights abuses and international crimes have been committed in the name of sovereignty or protected by the notion of sovereignty. Ideally, if States were to stop trumpeting the sovereignty horn, the international rule of law could make the world a more peaceful and stable place. Raphael Lemkin, as quoted by Samantha Power, best expressed the ills of State sovereignty in relation to international crimes, "Lemkin was appalled that the banner of 'state sovereignty' could shield men who tried to wipe out an entire minority. 'Sovereignty,'

the U.S.' fanatical rejection of the ICC, the *existence* of this perception within the U.S. government is not in question, and more likely than not, this perception even exist within some governments of State Parties to the Rome Statute. Without substantial changes to the ICC, the perception of the ICC being anti-sovereignty will put the ICC at odds with a multitude of sovereign States in the future, and given the power of the sovereign State in the Westphalian world order, the ICC will find itself in a very perilous position.

Unfortunately for the ICC, this perception might already be working against it. The U.S. has lodged a litany of legal complaints against the ICC, such as the overall power of the ICC, the independence of the Office of the Prosecutor, the jurisdiction of the ICC, and the ICC referral process, to name a few.[334] Despite the assurances of domestic and international legal organizations—including the American Bar Association— that the U.S.' concerns are effectively addressed in the Rome Statute,[335] U.S. opposition to the ICC remains firm and may also prove destructive.[336] In fact, the U.S. opposition to the ICC is so fervent that the U.S. has taken proactive steps to nullify and undermine the ICC through legislation[337]and bilateral treaties.[338] Most disturbing is the American Servicemembers' Protection Act, dubbed the "Hague Invasion Act", which not only prohibits any sort of U.S. governmental cooperation with the ICC, but also authorizes the President to use military force to extract any U.S. citizens or U.S. protected individuals held in ICC custody in The Hague, which should not be forgotten is located in The Netherlands, an U.S. NATO ally![339] Considering the U.S.' persistent assaults on

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Lemkin argued . . . 'implies conducting an independent foreign and internal policy, building of schools, construction of roads . . . all types of activity directed towards the welfare of people. Sovereignty cannot be conceived as the right to kill millions of innocent people.'" POWER, *supra* note 1, at 19.

334. *See Fact Sheet: The International Criminal Court*, U.S. Dept. of State, May 6, 2002, http://www.state.gov/s/wci/us_releases/fs/9978.htm (listing the U.S. objections to the ICC) [hereinafter Fact Sheet].

335. *See* A.B.A., *Recommendation that the United States Government Accede to the Rome Statute of the International Criminal Court*, at 5-9, Feb. 19, 2001, *available at* http://www.iccnow.org/documents/ABARes_onUSFeb01.pdf; Just. Richard J. Goldstone, *US Withdrawal from ICC Undermines Decades of American Leadership in International Justice*, The International Criminal Court Monitor: The Newspaper of the NGO Coalition for the International Criminal Court (New York), Issue 21, June 2002, at 3, 11, *available at* http://www.iccnow.org/documents/monitor21.200106.english.pdf (giving legitimate legal answers to each and every U.S. objection to the ICC).

336. BROOMHALL, *supra* note 59, at 168 ("Under the Bush Administration, such efforts to obtain a 'fix' have been abandoned, and replaced by a stance of active hostility . . ."); Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381, 385-86 (2002) (cataloging U.S. Senators disparaging and anti-cooperative remarks about the ICC, including calling the ICC an "international kangaroo court"); Heindel, *supra* note 332, at 364-65 (alluding to the words of U.S. officials that not only do not support the ICC, but would rather it not exists).

337. Amann & Sellers, *supra* note 336, at 384.

338. Heindel, *supra* note 332, at 365-67; *see generally* Chet J. Tan, Jr., *The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome Statute of the International Criminal Court*, 19 AM. U. INT'L. L. REV. 1115 (2004).

339. American Servicemembers' Protection Act of 2002, 22 U.S.C. § 7421 (2002), *available at* http://vienna.usembassy.gov/en/download/pdf/aspa2002.pdf; *see* Human Rights Watch, Human Rights

the ICC and its unresponsiveness to the counterarguments presented by ICC proponents, it is clear that the objections the U.S. holds against the ICC run deeper than mere issues with the language in the Rome Statute, and instead are motivated by the *perception* of the ICC as anti-sovereignty.[340]

The ICC may believe that it can go on successfully without U.S. support,[341] but the likelihood of this occurring is remote. The track record of large, hopeful international organizations existing without U.S. support is abysmal, considering that the lack of U.S. support already demolished one great international effort in the League of Nations[342] and arguably might spoil the greatest international agreement of all in the United Nations.[343] Although a majority of the world's nations signed and ratified the Rome Statute that brought about the ICC,[344] it is not beyond the realm of possibilities that the U.S. -a single, albeit powerful State- could destroy the ICC.[345] If the ICC hopes to corral U.S. support, the perception of the ICC as an international hegemon determined to demolish the sovereignty of all States must be eradicated. However, the question remains if it is even feasible for the ICC to squelch this perception? If it cannot, the ICC runs the risk of becoming the next ICJ, or even worse, a distant memory.[346]

News, *U.S.: 'Hague Invasion Act' Becomes Law: White House "Stops at Nothing" in Campaign Against War Crimes Court*, http://www.hrw.org/press/2002/08/aspa080302.htm (last visited Aug. 3, 2007).

340. BROOMHALL, *supra* note 59, at 183; SADAT, *supra* note 200, at 280. It is not a surprise that the U.S.' opposition to the ICC is driven by a perception of the ICC as an infringement on U.S. sovereignty. During the U.S. Senate deliberation on ratifying the Genocide convention, which received strong international support and was ratified by many countries, the opposition of the U.S. government to ratifying the Genocide Convention was an almost carbon copy to the present day opposition of the U.S. government to acceding to the Rome Statute and ICC. When every single legal or logistical critique put forward by the U.S. government for not ratifying the Genocide Convention was shot down by overwhelming evidence, the U.S. government still maintained a position against ratification. There forward, it became evident that the U.S. opposition stemmed from the perception of the Genocide Convention as an infringement on U.S. sovereignty. "The core American objection to the treaty, of course, had little to do with the text, which was no vaguer than any other law that had not yet been interpreted in a courtroom. Rather, American opposition was rooted in a traditional hostility toward any infringement on U.S. sovereignty, . . . [i]f the United States ratified the pact, senators worried they would thus authorize outsiders to poke around in the internal affairs of the United States or embroil the country in an 'entangling alliance'" POWER, *supra* note 1, at 65-9. That quote could, word for word, be used to describe current U.S. opposition to the ICC. Moreover, the entire situation surrounding the U.S. and the Genocide convention accurately describe the situation and sentiment revolving around the U.S. government's present day opposition to the ICC.

341. BROOMHALL, *supra* note 59, at 182-83.

342. BROOMHALL, *supra* note 51, at 183; SADAT, *supra* note 200, at 43.

343. *See* Tom Regan, *US, UN: Can This "Unhappy Marriage" Be Saved?*, Christian Sci. Monitor, June 9, 2006, *available at* http://www.csmonitor.com/2006/0609/dailyUpdate.html.

344. *See* International Criminal Court, Assembly of State Parties, *The State Parties to the Rome Statute*, http://www.icc-cpi.int/statesparties.html, (last visited Oct. 17, 2007).

345. *See* BROOMHALL, *supra* note 51, at 183; SADAT, *supra* note 200, at 43. The fact that one sovereign State could bring down or even disrupt any large international institution that is supported by a majority of States also supports the finding that can the international legal order continues to be State-centric.

346. *See* Simi Singh, *The Future of International Criminal Law: The International Criminal Court (ICC)*, 10 TOURO INT'L L. REV. 1, 10-11 (2000) (warning that the ICC could become just as ineffective institution as the ICJ, and documents reasons why the ICJ is ineffective); *but see* Douglass Cassel, *Is*

IV. ROAMING ICC: AN INTERNATIONAL CRIMINAL SYSTEM MADE FOR OUR STATE-CENTRIC WORLD

A. What Do the Flaws of the ICC Tell Us?

It is not a stretch to label the internal problems and conceptual missteps of the ICC as alarming, for theses issues raise considerable doubt as to the ability of the ICC to punish and deter the commission of international crimes. This is not to say the ICC is a failure, because the Rome Statute and the institution it created will be remembered as a watershed moment in the history of international criminal law. However, the world deserves a completely universal international criminal enforcement mechanism, because an all-inclusive system is a prerequisite to a truly effective system. Sadly, the current ICC cannot be considered as such. The question then becomes "what must be done to establish an international criminal enforcement mechanism that is sufficiently inclusive so as to properly deter and punish international criminals?"

Currently, the international legal community at large is bickering over the wrong issues regarding the ICC and the ICC's role in the progression of international criminal law. The focus of international debate has revolved around the internal problems with the ICC, specifically the structural and substantive facets of the Rome Statute discussed earlier.[347] While these issues are deserving of attention, such discussion does little to bring the world to a consensus over how to create a proper international criminal system, because many of these issues are secondary to the one issue that is fundamental to the development of an appropriate international criminal enforcement mechanism. This fundamental issue is one that this Note has already discussed briefly: How the Westphalian State-centric world order effects the development of international criminal law? In more basic terms, how to reconcile sovereignty with the international rule of law?

The reason why the resolution of this quandary is vital to the creation of a proper international criminal system is straightforward: if the sovereign authority of States is not upset by the creation of an international criminal system, in that the international criminal enforcement mechanism is not *perceived* by States as a threat to their sovereignty, such a system will have an greatly increased chance of surviving in our Westphalian world order. Considering the importance of this issue, it is disappointing that the Rome Statute Framers fell back onto the

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There a New World Court?, 1 NW. U. J. INT'L HUM. RTS. 1, 18-31 (2003) (showing that the ICJ's surge in caseload is an indication of the resurrection in the ICJ's importance); Chris Borgen, *Reconsidering the Reconsideration of the ICJ*, Opinio Juris, http://lawofnations.blogspot.com/2005/06/reconsidering-reconsideration-of-icj.html (arguing that the ICJ is not a very good judicial body, but is the one of the premier international legislative body).

347. By substantive and structural issues, this Notes means issues regarding the language of the Rome Statute and the internal structure of the ICC, which turn into arguments over, for instance, the independence of the Prosecutor, the level of cooperation State Parties must give, the limits of ICC jurisdiction, etc. Essentially, issues that are not conceptual, but more legal in nature. *See* Fact Sheet, *supra* note 334 (showing that a majority of the U.S.' official objections to the ICC—considered the main opponent of the ICC—deal with structural and substantive aspect of the Rome Statute and the ICC); *supra* section IV, D.

conventional, but unworkable conclusion that only through compromise of the uncompromisable—sovereignty and international rule of law—can an international criminal enforcement mechanism be agreed upon by sovereign States. Thus, the Rome Statute Framers' decision to promote the establishment of a detached, independent international institution bestowed with limited, yet significant international criminal jurisdiction over international crimes not only failed to resolve the dilemma between sovereignty and the international rule of law, but created deeper division among the international community. Where some States were willing to approve of the creation of the ICC at the cost of losing some sovereignty, other States balked at the idea of an international criminal system that jeopardized their unbridled sovereignty. The result of the Rome Statute Framers' miscalculation is a problematic ICC that has not received the support of the world's most powerful country, the U.S. [348] No matter how misguided the U.S. may be on the ICC issue, the reality is that an international criminal system without the U.S. holds a slim chance of being as effective as it would be with the preeminent international economic, military, and political leader.[349] Furthermore, a true sense of international justice can never be realized without the moral support and cooperation of the U.S.[350] Does this mean the rest of the world must back down to U.S. demands in order to achieve any semblance of an international criminal system? Certainly not, for having it the U.S.' way would abandon the much needed support of the rest of the world. Instead, this Note proposes a new option.

To set the stage for this new option, the following section delves deeper into the philosophical and conceptual pitfalls of the conventional method used to create international criminal institutions. To date, international efforts towards the establishment of an international criminal enforcement mechanism focused on either the *ad hoc*—Nuremberg, the ICTY, the ICTR—or prospective—the ICC—creation of an international criminal body without addressing the structural weakness of such options in a State-centric model of international law. This structural weakness exists because these prior mechanisms are grounded upon the murky realm that exists between, and outside, sovereign states. Thus, when the international community agrees to the formation of an international criminal enforcement mechanism whereby sovereign States are bound, to one degree or another, to an entity that exists outside of the realm of all sovereign States, this agreement is perched precariously beyond the strength of the Westphalian world order and cannot stand up to the concerns of State actors that stem from the very core of this order. Using the ICC as an example to clarify, the ICC is an entity that exists completely detached from the confines of any and all State Parties. The ICC

348. *See* SADAT, *supra* note 200, at 280; *see generally* Eric P. Schwartz, *The United States and the International Criminal Court: The Case for "Dexterous Multilateralism"*, 4 CHI. J. INT'L L. 223 (2003) (diagramming the U.S. position against the ICC, which is at the forefront of opposition to the ICC).

349. BROOMHALL, *supra* note 51, at 163-64; SADAT, *supra* note 200, at 43; *see* Amann & Sellers, *supra* note 336, at 382 (stating that the U.S. will likely continue to distance itself from the ICC, which severely hampers the ICC's future).

350. SADAT, *supra* note 200, at 43.

is on the outside looking in on the sovereignty of all State Parties, or as the U.S. inartfully, but accurately put it, "the Court... [is] simply 'out there' in the international system."[351] Yet, despite its outsider status, the ICC can potentially bind sovereign State Parties to its jurisdiction.[352] Little thought has gone into the creation of an international criminal system tailored to the *strength* of our State-centric world, the strength being the domestic authority of each and every sovereign nation. Few question the power a sovereign State possesses over its territory, a power which derives from the State exercising dominion over its people and land. This unquestioned power of sovereign States is the strength of the State-centric system of international law, and this Note proposes that the ICC reinvent itself in order to harness this strength.

B. Details of the Roaming ICC

This Note's proposal is for the international legal community to re-conceptualize the manner in which an international criminal system should exist. Instead of creating an independent, detached, outside entity that hovers over all sovereign States, the international community should adopt an international criminal system that exists within every sovereign State. The heart of the proposal is a decentralized international criminal system that would facilitate the creation of temporary courts of law manned by domestic, regional, and international Judges and Prosecutors that would exercise the same substantive and procedural international criminal laws in the prosecution and adjudication of an alleged international criminal violation, regardless of where the court resides geographically. The "Roaming ICC" proposal does not call for the abandonment of the current ICC in its entirety, but rather a reformulation of the conceptual infrastructure of the current ICC to reflect a new thinking of how an international criminal system should be. Accordingly, the aim of the Roaming ICC proposal is to make alterations to the framework of the current ICC, not to abolish it, and thus transform the current ICC into the Roaming ICC.

The Roaming ICC proposal has two essential components. The first component is the backbone of the Roaming ICC: the adoption of the Roaming ICC substantive and procedural laws into each State Party's domestic law. The Roaming ICC's substantive and procedural laws[353] would not be drastically different from the Rome Statute, except for changes to the Rome Statute's procedural laws that are necessary to mesh the diversity of international procedural

351. Bolton Speech, *supra* note 329.

352. *See* Rome Statute of the ICC, *supra* note 207, art. 3 (inferring that the ICC is separate from any sovereign State, for it enters into agreements with the Hague for its occupancy, and can leave the Hague if need be).

353. As any honest lawyer would admit, the difference between substantive and procedural law can be as clear as mud. For purposes of this Note, Roaming ICC substantive law incorporates the jurisdictional concepts, general principles of law, and subject matter of the Rome Statute, save any obvious changes that would need to be made. By procedural, this Note means the rules that govern the conduct of an ICC trial, not the procedural rules associated with the complimentarity system, or the procedural rules associated with the ICCs jurisdiction to adjudicate. The Roaming ICC gets rid of these procedural rules.

and court room rules.[354] More precisely, the Rome Statute's subject matter laws giving the current ICC jurisdiction over genocide, crimes against humanity, war crimes, and aggression[355] would also be the Roaming ICC's substantive law and the Rome Statute's procedural laws on prosecutorial duties, court room rules, and pre-trial procedures would become the Roaming ICC's procedural laws, and altogether, would form the law of the Roaming ICC from which every State Party would enact into their internal law, *word for word.* No State Party would be allowed to make reservations or amendments to either the substantive or procedural laws of the Roaming ICC, for absolute consistency from one State to another is critical for the success of the Roaming ICC.[356] While this concept of totally adopting the Rome Statute into the domestic law of a State has been followed by some current ICC State Parties,[357] others have not taken that course in regard to the Rome Statute.[358] It must be stressed that it is mandatory that the each State Party to the Roaming ICC adopt the substantive—including relevant jurisdictional aspects—and procedural components of the Roaming ICC jurisprudence into the State Party's domestic law without exception.[359] Otherwise, important jurisdictional aspects of the Roaming ICC would crumble.

The adoption of the Roaming ICC's substantive and procedural law into every single nation's domestic law may sound impossible, but there are indicators that this task is not as daunting as it might seem. There are numerous international treaties and conventions, not to mention the Rome Statute itself, that exhibit the world community's ability to agree on substantive laws against genocide, crimes against humanity, war crimes, and to a certain degree, aggression.[360] Taking the

354. Because the current ICC is an international, independent body, their procedural laws (i.e. within the court room, pre-trial, etc.) were developed as such. However, the Roaming ICC, as will be shown, ends up operating in the domestic jurisdiction of any State Parties, so this facet of the Roaming ICC would necessitate more international negotiations to come up with internal procedural laws for the Roaming ICC that all States could agree with. This will be discussed later.

355. As noted, the aggression issue is still unresolved. *Supra* note 252. However, at the point in time when the stalemate over defining the crime of aggression is resolved, it would be incorporated into the Roaming ICC. At present, the crime of aggression would exist within the Roaming ICC as it does in the current ICC.

356. *See* Fact Sheet, *supra* note 334 (showing that the U.S. is critical of the fact that the Rome Statute does not allow States to add reservations, which in the Roaming ICC would be a similar requirement).

357. *See Implementation Strategies Adopted by: Australia, New Zealand, Canada, United Kingdom and South Africa*, INT'L JUSTICE (Human Rights Watch, New York, NY), Dec. 18, 2002, http://www.hrw.org/campaigns/icc/docs/chart1.pdf. Of course, it is not total, complete adoption, but rather a total adoption of the Rome Statute's subject matter laws.

358. *See Implementation Strategies Adopted by: Argentina, Spain, France, Switzerland and Belgium*, INT'L JUSTICE (Human Rights Watch, New York, NY), Dec. 18, 2002, http://www.hrw.org/campaigns/icc/docs/chart3.pdf.

359. Essentially, every State Party to the Roaming ICC would have mirror image jurisprudences in regards to the Roaming ICC.

360. *See, e.g,.* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 49, 6 U.S.T. 3114, 75 U.N.T.S. 31; Genocide Convention, *supra* note 187; Hague Convention Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, 36 Stat. 2277, T.S. No. 539; Rome Statute of the ICC, *supra* note 207.These international laws are examples of already agreed upon substantive laws against genocide, war crimes,

next step in having each country incorporate these laws without derogation into their own jurisprudence will take significant amounts of time and effort, but is far from an insurmountable task. The idea of adopting foreign material into a domestic jurisprudence is not an uncommon practice in the U.S., for the adoption of Restatements and Uniform Acts into the law of individual U.S. states occurs frequently and parallels the same logic as adopting Roaming ICC substantive and procedural law into the national law of all Roaming ICC State Parties.[361] However, crafting a procedural system that the Roaming ICC could use in any State and that Judges, Prosecutors, and Defense attorneys of varied legal background could work with will take careful negotiations and a tremendous amount of effort to accomplish, especially considering the gulf of differences between civil and common law criminal systems. Nevertheless, the current ICC contains procedural laws that a majority of the international community has already agreed to, and additions and/or modifications to this already existing procedural law is a good starting point from which to form an uniform, workable procedural system that every State Party could agree to implementing.

The second component of the Roaming ICC proposal exhibits what is the most radical difference between the Roaming ICC and the current ICC: the transition from a centralized to a decentralized legal entity. Two Articles in the Rome Statute allude to the possibility of the current ICC carrying out its judicial functions within a State Party's territory, but instead of this possibility being the exception, the Roaming ICC proposal would make this practice the rule.[362] In addition to each Roaming ICC State Party adopting the substantive and procedural law of the Roaming ICC into their domestic jurisprudence, each State Party must also agree to three contractual obligations in the Roaming ICC agreement: the State Party must allow Roaming ICC proceedings to occur within their territory; the State Party must fulfill their designated duties and obligations if a Roaming ICC proceeding were to occur in their territory; and the State Party must accept that international and regional Judges, Prosecutors, and other staff will enter its territory to fulfill their duties and obligations in a Roaming ICC proceeding. Making the Roaming ICC a decentralized court that could set up operation in the jurisdiction of any Roaming ICC State Party on demand is a change that unequivocally capitalizes on the strength of the State-centric system of international law, because pursuant to the Roaming ICC contractual agreement, the Roaming ICC would undertake its judicial proceeding within the domain of the State Party where the international crime occurred. The intended consequence being that the territorial jurisdiction and expertise of this State Party would be utilized in order to effectuate the Roaming ICC process.

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crimes against humanity, and aggression that could be adopted into each and every Roaming ICC State Parties' jurisprudence.

361. *See generally* Kristen D. Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423 (2004) (describing the philosophy and practice of adopting Restatements into U.S. state's jurisprudence, and the same practice could be used by Roaming ICC State Parties in adoption of Roaming ICC substantive and procedural laws).

362. Rome Statute, *supra* note 207, art. 3-4.

The basic setup of the Roaming ICC system would be a three-tiered hierarchy, with varying amount of judicial and prosecutorial authority dispersed throughout the branches of the Roaming ICC. Each level of the Roaming ICC would contain a panel of Judges and a Prosecutor's Office.[363] The highest level would be the Roaming ICC Presidential Authority made up of internationally chosen Judges and an internationally chosen Prosecutor's Office that would control ultimate prosecutorial discretion in all Roaming ICC cases.[364] The second highest level of the Roaming ICC system would be made up of multiple Roaming ICC Regional Authorities that would represent large regional territories of the world, such as Africa, Europe, Asia, North America, etc. Each Regional Authority, accordingly, would have Judges and Prosecutors nominated by and chosen from their respective region. Finally, the lowest level of the Roaming ICC framework would comprise the many Roaming ICC State Authorities that represent each State Party, with their own domestic Judges and Prosecutors.

An example of the course of events that would occur if an alleged international crime happened under the Roaming ICC regime will help elaborate on the structure and inner-working of the Roaming ICC. An alleged act of genocide occurs in State Party A in Region A. Either the Prosecutors Office for State A, the Regional Prosecutor's Office for Region A, the Presidential Prosecutor's Office, or a collaborative team of these offices may start an investigation into the alleged genocide.[365] The three prosecutorial offices shall cooperate to decide if a prosecution should go forward, but ultimate prosecutorial discretion on any prosecution would belong with the Presidential Prosecutor's

363. Every Judge and Prosecutor would be trained in the laws and procedures of the Roaming ICC, thus equally useful in any State Party they may find themselves in. Also, membership requirements for Judges and Prosecutors will be the same as the current ICC membership requirements. As for all the other organs of the current ICC, they could stay centralized in the Presidential Authority under the Roaming ICC proposal, such as the Registry, defense counsel assignment department, victims and civil parties unit, witness protection unit, investigator's office, etc. However, these units would be able to work outside of the centralized unit, such as the Registry could have a satellite unit set up where Roaming ICC proceedings were taking place. This does not discount the possibility that Regional and State Party authorities would have similar departments and services.

364. All the Prosecutor Offices across the Roaming ICC network would cooperate per the Roaming ICC agreement and would defer to each other in certain circumstances. However, ultimate Prosecutorial discretion is best left to the Presidential Prosecutor's Office, because this office would be the most protected from the political and social implications on the ground where the international crime occurred and would presumably be the most objective in deciding if an *international* crime did occur and if it should be adjudicated. Again, information would flow freely among the Prosecutor's Offices, and the Presidential Prosecutor's Office would be obligated to consult with the State Party and Regional Prosecutor's Office in a majority of instances. The possibility exists that a procedure could be put in place where, if the State Party and Regional Prosecutor Office agree on one course of action and the Presidential Prosecutor's Office desires another course, the State Party and Regional Prosecutor's Office could overrule the Presidential Prosecutor's Office or appeal to a Pre-Trial Chambers for resolution.

365. Similar to the current ICC, each Prosecutor's Office, depending on which level it is from, will need permission by a Judge from its Roaming ICC level at certain stages in the investigation process in order to proceed with the investigation. However, when the Prosecutor's Office would need this permission is a detail not worth going into in this Note.

Office.[366] In addition, the Presidential Prosecutor's Office would have ultimate discretion to decide if the Presidential Prosecutor's Office, the Regional Prosecutor's Office for Region A, or the Prosecutor's Office for State Party A shall lead the prosecution of the case.[367] Once the investigation turns into an official prosecution, a Pre-Trial Judge from State Party A would be appointed to supervise pre-trial litigation, who would possess the same basic powers and responsibilities as a Pre-Trial Judge at the ICC.[368] Additionally, a panel of one Presidential Authority judge, one Region A judge, and one State Party A judge would be formed to handle select appeals lodged by parties against decision handed down by the Pre-Trial Judge. As a trial becomes closer to reality, a panel of Trial Judges would be formed consisting of one Judge from State Party A, one from Region A, and one from the Presidential Authority. The Judge from the Presidency shall be chief Judge, but each Judge would have equal weight in deciding procedural and substantive issues that arise as well as the ultimate judgment of the case. This mixed panel of Judges is just an extension of a concept already used by the UN-sponsored hybrid international criminal tribunals in Sierra Leone, Cambodia, and East Timor where domestic and international judges work on panels together.[369]

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366. However, there could be a procedure whereby the Roaming ICC State Party Prosecutor and the Regional Authority Prosecutor can bind forces to overrule a decision of the Presidency Prosecutor, which will alleviate U.S. concerns about overzealous international Prosecutors. Also, the idea of domestic and international prosecutors working together is not just a theory, but an idea currently at work at the UN-Cambodia criminal tribunal. *See* UN-Cambodia Agreement, *infra* note 369, art. 6.

367. The Presidential Prosecutor's Office would make a determination like this upon consideration of resources, time/effort, effectiveness, suitable distance from the area where the international crimes took place, etc., Whatever Prosecutor that ends up prosecuting the case will be treated as a Prosecutor of the forum State Party. Furthermore, there will be no set rules on how the makeup of the Prosecutor's team should be, such as what office must make up what percentage of the Prosecutorial team.

368. The background of this Pre-Trial Judge is debatable, but the existence of one is required. The Pre-Trial Judge could be from the same Authority "level" as the lead Prosecutor that prosecutes the case in chief, but could be from any Authority level. The Pre-Trial Judge would monitor the investigation of the alleged international crime, tackle the multiple pre-trial procedural issues that arise from investigations and preparation for trial, and confirm the indictment.

369. Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, U.N.- Sierra Leone, Jan. 16, 2002, art. 2, U.N. Doc. S/2002/246, *available at* http://www.sc-sl.org/scsl-agreement.html; Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, UN-Cambodia, June 6, 2003, art. 3, 5, U.N. Doc. A/Res/57/228 B, *available at* http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGC.pdf [*hereinafter* UN-Cambodia Agreement]; Agreement On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses in East Timor, U.N. Transitional Administration in East Timor, § 22, U.N. Doc. UNTAET/REG/2000/15 (2000) (pursuant to U.N. SCOR Res. 1272), *available at* http:// www.un.org/peace/etimor/untaetR/Reg0015E.pdf; *see* David Cohen, *Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?*, ASIAPACIFIC ISSUES, No. 61 (East-West Center, Honolulu, HI), Aug. 2002, at 1, *available at* http://www.eastwestcenter.org/stored/pdfs/api061.pdf [*hereinafter* AsiaPacific]. Cohen's piece criticizes the hybrid tribunal idea, but mainly for funding reasons, which would not be an issue for the Roaming ICC, because the Roaming ICC structure will be able to pool resources from all three levels of the Roaming ICC—State, Regional, and Presidential—; thus alleviating and spreading out financial concerns associated with international criminal trials. *Infra* section V, D, 4. There has also been

The Roaming ICC proceedings would take place in State A in a pre-existing forum within State A.[370] Due to the alleged genocide occurring in State Party A in violations of State Party A's Roaming ICC laws adopted by State Party A's legislature or equal body, State Party A would have the obligation to carry out all logistical and necessary aspects of the trial, which would include arrest and detention of suspects, obtaining and securing evidence, victim and witness protection, forum security, subsequent enforcement of court decisions, etc.[371] After a judgment is reached in the case, the Roaming ICC proceedings within State A would be over, and the entire operation would be shut down. This entire Roaming ICC investigation, pre-trial, and trial process would be replicated in any State Party where an international crime occurred, or any State Party for that matter. Additionally, given the immense, yet decentralized structure of the Roaming ICC, many Roaming ICC proceedings could occur simultaneously in the territory of multiple Roaming ICC State Parties, assuming the need was present.

In regard to appeals, the Roaming ICC Appeals process would institute a different procedure from the current ICC. In order to avoid domestic bias and to afford the defendant the most practical opportunities to prove his or her innocence or correct procedural errors made at trial, the Roaming ICC appellate process would be two-tiered with the first appeal of the presumed genocide conviction in State Party A made to an panel of Judges solely from the Region A Authority, and the final appeal would face a panel of Judges solely from the Presidential Authority. To ease the worries of some Roaming ICC State Parties that there would be regional or international review of a Roaming ICC judgment reached within the territory of the State Party, appeals could only be made for procedural errors or grave misapplications of Roaming ICC substantive law that would be tantamount to subversion of the Roaming ICC process.

Having laid out an example of a hypothetical Roaming ICC proceeding, there is a noticeable parallel between the Roaming ICC and the UN-Lebanon tribunal. The UN-Lebanon tribunal is a hybrid international criminal tribunal currently under development, and like other UN hybrid tribunals, is the creation of an agreement between the UN and Lebanon to form an international criminal tribunal

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additionally criticism regarding the rift between the Cambodian and international Judges over procedural matters. *See* Seth Mydans, *Unwieldy Court Further Complicates Khmer Rouge Trial*, INT'L HERALD TRIB., Jan. 25, 2007, http://www.iht.com/articles/2007/01/25/news/cambo.php. However, this issue would not be a problem for the Roaming ICC, because negotiations prior to the world-wide adoption of the Roaming ICC's substantive and procedural laws would smooth out these types of issues. Also, one must remember that these tribunals are not all the same. For example, the UN-Cambodia criminal court would best be called a "mixed" or internationalized domestic criminal court, because it is not an international criminal tribunal in the strict sense. *See* SCHABAS, *supra* note 331, at 6.

370. If a violation occurs over separate countries, a decision by the Presidential Authority about the most suitable forum or where the most substantial violations occurred would decide the correct State Party forum. The possibility of a Roaming ICC proceeding not taking place where the international crime occurred will be addressed later in this Note. *Infra* section V, D, 1.

371. The Presidency and Regional Authority would be able to provide additional funds, manpower, and cooperation needed to carry out these functions (i.e. use their Victim's Unit or relevant personnel to assist the State Parties victim representation and protection efforts).

composed of international and domestic Judges and Prosecutors.[372] The objective of this tribunal is to handle the prosecution and adjudication of the Hariri assassination and related criminal offenses.[373] However, unlike other UN hybrid tribunals, the UN-Lebanon tribunal will apply Lebanese criminal penal law exclusively, rather than applying a mixture of international and domestic criminal law.[374]

The similarities between these two concepts is that the Roaming ICC system would be the mass institutionalization of the idea behind the UN-Lebanon tribunal, which in turn would facilitate the duplication of UN-Lebanon-like tribunals anywhere in the world where an international crime occurs or in any State Party hosting a Roaming ICC proceeding. Quite literally, the UN-Lebanon tribunal would be an example of the Roaming ICC system in action, specifically if a Roaming ICC proceeding was to take place in Lebanon.[375] Additionally, like the UN-Lebanon tribunal, a Roaming ICC proceeding would apply exclusively the local criminal law as well. However, the local criminal law applied would be the aforementioned Roaming ICC substantive and procedural law that every State Party would have already incorporated in its domestic law with verbatim precision. This correlation between the Roaming ICC and the UN-Lebanon tribunal indicates that there is an undercurrent of approval within the international community for the Roaming ICC proposal, because the international community has already legitimized and accepted—as evidenced by the planned creation of the UN-Lebanon tribunal—a fundamental precept of the Roaming ICC concept.

There are further tangible indications that the international community would embrace the Roaming ICC. The UN-Cambodian Tribunal that is now underway is best described as a "mixed" or internationalized domestic criminal tribunal, which means that despite substantial international presence at the tribunal, it is for all tenses and purposes a domestic criminal court.[376] The very name of this tribunal indicates as such, the Extraordinary Chambers in the Courts of Cambodia

372. The Secretary General, *Report of the Secretary General on the Establishment of a Special Tribunal for Lebanon*, annex, pmbl., art. 1, 8, 11, *delivered to the Security Council*, U.N. Doc. S/2006/893 (Nov. 15, 2006) [hereinafter UN-Lebanon Report]. Additionally, the UN-Lebanon tribunal would be independent of the United Nations and the Lebanese judiciary, and would have primacy of jurisdiction over domestic Lebanese courts. *Id.*, ¶ 6, attach. art. 4.

373. *Id.*, ¶ 1.

374. *Id.*, attach. art. 2; *see* Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, UN-Cambodia, art. 3 new-8, Oct. 27, 2004, Reach Kram No. NS/RKM/0801/12 (2001) (Cambodia), *available at* http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf [*hereinafter* UN-Cambodian Statute]; Statute of the Special Court for Sierra Leone, UN-Sierra Leone, arts. 2-5, Jan. 16, 2002, U.N. Doc S/2002/246, *available at* http://www.sc-sl.org/scsl-statute.html.

375. At time of publishing, the seat of this UN-Lebanon Tribunal has not been determined precisely. Along with the tribunal being located in Lebanon, there remains the possibility that the tribunal will be seated in The Hague, Utrecht, or elsewhere in Europe. However, regardless where this court takes place, many of the points made here still apply.

376. SCHABAS, *supra* note 331, at 6; UN-Cambodia Agreement, *supra* note 369, pmbl, art. 1, 31; UN-Cambodian Statute, *supra* note 374, art. 2 new.

(ECCC).[377] Each organ and department within this tribunal is equally represented by international and Cambodian personnel.[378] While it remains to be seen if this particular tribunal will be a total success, the existence of the ECCC further supports the potential reality of the Roaming ICC. Specifically, the ECCC would be another example of the Roaming ICC in action, because a Roaming ICC tribunal in Cambodia would similarly be operated in total by an equal or equitable distribution of international, regional, and domestic personnel. The ECCC—in its makeup and conceptual foundation—is more or less a carbon copy of a Roaming ICC tribunal at work, and as the ECCC continues towards becoming a genuine success, the Roaming ICC proposal gradually gains legitimacy as well.

To dispel any confusion about the nature of the Roaming ICC, once a Roaming ICC proceeding begins operation in a State Party's territory, this does not mean that this proceeding is a *de facto* State Party proceeding and/or subject to *all* of the State Party's domestic laws. For example, a Roaming ICC proceeding taking place in the U.S. does not mean that the person tried would be subject to or receive the benefit of all U.S. domestic laws, such as the 6th Amendment right to a jury trial. The Roaming ICC proceeding would be technically separate from the State Party. Theoretically, it is best to envision the State Party as an "active host" to the Roaming ICC proceeding. The State Party would contribute its jurisdictional supremacy—such as its police forces, investigators, subpoena powers—, its prosecutors and judges, its court rooms, and so on, to the Roaming ICC for use during the proceeding. This arrangement would be much like the relationship between The Netherlands and the ICJ, ICTY, and the ICC, where Dutch authorities and jurisdiction are often used for the benefit of these institutions, but the whole of Dutch law does not apply to either these institutions or the individuals being prosecuted.[379]

C. What the Roaming ICC is Not

Just as important as it is to lay out what the Roaming ICC would be, it is also important to distinguish the Roaming ICC from other similar proposals. First, the Roaming ICC is not a "community of courts" idea, where the international criminal enforcement mechanism is, essentially, a web of domestic courts practicing international criminal jurisdiction over international crimes.[380] The

377. UN-Cambodia Agreement, *supra* note 369.

378. UN-Cambodia Agreement, *supra* note 369, art. 3, 5-6; UN-Cambodian Statute, *supra* note 374, art. 10 new, 16, 23 new.

379. The Dutch-ICJ/ICTY/ICC arrangement is not completely parallel to the Roaming ICC/State Party arrangement, for those tried at either the ICTY or ICC are not being tried for violation of any Dutch criminal law, which an individual being tried at a Roaming ICC proceeding would be adjudicated with, theoretically, if tried in The Netherlands. This would be so under the Roaming ICC system because The Netherlands would have incorporated Roaming ICC's substantive and procedural laws into its own jurisprudence, so the person tried would be—technically speaking—prosecuted for violation of this law, regardless of where the events took place. This idea is further elaborated below. *Infra* section IV (D) (1).

380. *See* Burke-White, *supra* note 60, at 75-97. While some of the fundamental principles of the community of courts idea are present in the Roaming ICC, the difference is that the Roaming ICC involves international participation at a much larger scale and requires far more organization than the

community of courts concept differs in that it lacks active international participation and oversight, and is better described as an organic coalition of domestic sovereign States practicing international criminal law on their own.[381] The extensive involvement of the international community is necessary, because sovereign States, when left alone, have proven themselves to be untrustworthy in doing the job of the international community in fighting international crime.[382] Even international pressure on sovereign States to use domestic measures to punish the commission of international crimes has not shamed States into action.[383] The Roaming ICC, on the other hand, utilizes active international participation in the development of a system whereby an agreement between sovereign States and the international community[384] will obligate States to work with the international community in prosecuting and punishing international criminals. Specifically, sovereign States will assist by allowing the international community to "piggyback" onto the undisputed territorial authority and power of the sovereign State, enabling both the State and the international community to fight international crime in a collective manner. The Roaming ICC, basically, is the concrete institutionalization of an agreement between sovereign States and the international community to work together in enforcing international criminal law.

Additionally, the Roaming ICC is not a disjointed series of independent hybrid courts, or an agreement between the current ICC and an individual State to allow the ICC to set up a pseudo-hybrid court in the individual State.[385] These

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community of courts idea. Also, it is unknown what type of international criminal jurisdiction would be practice under the community of courts idea, be it territorial, nationality, or universal.

381. *Id.* at 86 ("The emerging community of courts is largely self-organizing and self-regulating. Though some of the principles that regulate the community are found in the Rome Statute, the community itself lacks any controlling or regulating authority. Therefore, the relationships and interactions among these courts are essential to the effectiveness of the emerging system of international criminal justice").

382. *See supra* notes 48-60 and accompanying text. Additionally, even assuming many domestic States were to practice international criminal law through whatever jurisdictional rationale, without a standard uniform procedure to be used by these domestic States and without an international oversight organization, these multiple domestic States end up applying diverse interpretations of international criminal law and apply them in overly diverse ways. *See, e.g.,* Redress Memo, *supra* note 35; New Redress Memo, *supra* note 35.

383. *See, e.g., Universal Jurisdiction in Europe: The State of the Art,* Human Rights Watch Reports (Human Rights Watch, New York, NY), June, 2006, at 1-2, *available at* http://hrw.org/reports/2006/ij0606/index.htm; Antonio Cassese, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, 1 J. INT'L CRIM. JUST. 589, 589-595 (2003).

384. It is odd to use the term "international community" outside of the context of the Roaming ICC, because the international community is an abstract term, not a tangible entity, like a sovereign State. However, in the context of the Roaming ICC, the international community is the combination of every other State outside of the State where the trial would occur.

385. *See* Rosanna Lipscomb, *Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan*, 106 COLUM. L. REV. 182, 204-212 (2006). Lipscomb also makes mention of Article 3 and 4 as a basis for moving the ICC out of The Hague. However, Lipscomb's idea focuses on a one time use of these Articles as a statutory basis from which to create an ICC-Hybrid Tribunal in the Sudan. This Note's Roaming ICC proposal uses these Articles to promote a much more radical departure from the current ICC, where these Articles would be the springboard from which the current ICC would transform into a cohesive network of "ready to mix", but temporary

ideas, while following similar logic and promoting similar objectives as the Roaming ICC, are far less organized and developed than a potential Roaming ICC regime. To use the analogy of a hybrid tribunal to differentiate the Roaming ICC from these hybrid tribunals ideas: under the Roaming ICC framework, every State Party would have a pre-existing organization—the Roaming ICC State Authority, which in the instance of the U.S., could be an alliance between the Department of Justice and Federal Judiciary— to receive and work with the incoming constituents of the Roaming ICC Regional and Presidential Authorities, primarily being the Prosecutors and Judges from those authorities. The next series of steps from this point would include the State Party overseeing, if feasible, logistics for the trial,[386] the formation of the Judge's panel by the joint collaboration between each Roaming ICC Authority, and the joint decision by the Prosecutor's Offices from the varying levels of the Roaming ICC on which Prosecutor's Office will take on which duties. Therefore, a hybrid tribunal of sorts would materialize more or less overnight after the Roaming ICC decides to investigate and potentially prosecute an international crime, given that the infrastructure needed for an investigation, pre-trial, and trial would already be in place within the State Party—save some minor aspects—and only the makeup of the various Judges' Panel, Prosecutorial team, and Defense team would be left undetermined.[387]

Finally, the Roaming ICC is not a compromise between sovereignty and the international rule of law. The Rome Statute Framers' believed that only through compromise of these two diametrically opposed interests could an effective international criminal enforcement mechanism become reality. The Rome Statute Framer's belief deserves criticism, because there is no compromise in a game of "tug of war". One either wins or loses. The Roaming ICC proposal flips the paradigm away from compromise by creating an international criminal system structurally and conceptually built into the Westphalian world of sovereign States. In other words, the Roaming ICC is a system that ensures the international rule of law through the powers of sovereign States. Neither sovereignty nor the international rule of law is required to compromise in order to create the Roaming ICC. Consequently, sovereign States do not feel trampled by the international rule of law, and the international rule of law is not sacrificed in the name of sovereignty.

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hybrid tribunals in every State Party. *Id.* at 206-07.

386. Logistics, as already mentioned, would include all aspects necessary to undertake a trial, from the mundane to the critical, from providing a physical forum for the proceedings to apprehending suspects. However, some substantial assistance would be provided by the Roaming ICC Registry and other organs of the Roaming ICC Presidency, such as paperwork, international investigators, assistants to the Judges, etc.

387. While it might be only of academic interest, technically speaking, the Roaming ICC would "enter" the sovereign State in order to adjudicate the alleged international crime. It would not be as if, using the U.S. as an example, the U.S. was adjudicating international crimes with assistance from the Roaming ICC's Presidential and Regional Authorities. However, in actuality, the perception might be as such, because the U.S. would be responsible for ensuring the trial runs effectively, plus an American Judge and Prosecutor(s) would be actively participating in the trial along side Regional and Presidential Judges and Prosecutors.

D. Advantages of the Roaming ICC

The Roaming ICC possesses clear advantages over the current ICC, mainly due to the construct of the Roaming ICC being a workable international criminal system tailored to a State-centric world. The advantages, discussed below, are not only numerous, but substantial.

1. Jurisdictional Prowess: An Enhancement on Jurisdiction to Prescribe and to Adjudicate

The Roaming ICC would constitute a welcomed improvement over the current ICC in terms of its jurisdiction to prescribe and its jurisdiction to adjudicate. In regard to prescriptive jurisdiction, this Note has made much of the groundbreaking nature of the current ICC's jurisdiction to prescribe, namely that the Rome Statute exercised universal international jurisdiction when the Rome Statute Framers prescribed genocide, crimes against humanity, war crimes, and aggression as internationally criminal wherever it takes place. The Roaming ICC does not wish to tarnish or alter this accomplishment,[388] but enhance this feat by making the Rome Statute's subject matter laws perfectly uniform in every State Party's jurisprudence. As a result, the Roaming ICC's prescriptive jurisdiction would be impervious to challenge or criticism, and furthermore, would utterly validate the *truly international* reprehensibility of these crimes by making them verbatim entries into the national law of every State on Earth.[389] Additionally, if the law of every State Party is identical in respect to these international crimes, then the legitimacy of the Roaming ICC moving from prescription to adjudication is significantly improved, because it will mirror the treatment domestic courts give domestic criminal laws where the jurisdiction to prescribe is almost always followed by the jurisdiction to adjudicate.[390]

Jurisdictionally speaking, the greatest improvement of the Roaming ICC over the current ICC is its jurisdiction to adjudicate. The Roaming ICC will work from a superb jurisdictional position to adjudicate almost all situations of international criminal violations, because in a majority of circumstances, all the organs of the Roaming ICC framework will premise their jurisdiction to adjudicate on the most credible justification of them all: the territorial jurisdiction of the domestic

388. Included in the Roaming ICC's desire not to tarnish or alter the Rome Statute/ICC's accomplishments in terms of jurisdiction to prescribe, the Roaming ICC proposal would not change anything in regards to the current ICC's relationship with customary international criminal law. The exact same structural concept that allows customary international criminal law to coexist with the Rome Statute would be incorporated in the Roaming ICC system. *See supra* section IV, B.

389. As already stressed, but worthy of more emphasis, the idea of adopting a substantive and procedural jurisprudence into every State's laws, word for word, sounds impossible on several levels. However, the world is not that far off from being able to do just this. The Rome Statute codified certain international crimes to an extent not demonstrated before, and the procedural experiences of the ICTY, ICTR, and in the future, ICC will bring the world closer to an agreement on the procedural aspects of adjudicating international crimes. Thus, the next step is to undertake the Roaming ICC proposal, and focus on negotiations—no matter how long—geared towards realizing this proposal's promise.

390. *Supra* note 254 and accompanying text.

Roaming ICC State Party to adjudicate violations of their own domestic laws. [391]

In the clear cut case of an international crime being committed within a Roaming ICC State Party, the suspect staying in the State Party where the crime was committed, and the decision to prosecute this individual is made after an investigation has concluded, then the State Party will apprehend the suspect, thus initiating the Roaming ICC adjudicative process. The Roaming ICC State Party will apprehend the suspect, because the afflicted State Party has a general interest and legitimate reason to adjudicate infractions of their own laws within their own borders, specifically in this case, violation of their Roaming ICC laws. As the suspect sits in custody,[392] the Roaming ICC State Party will be obligated pursuant to the Roaming ICC agreement to let the Regional and Presidential Authorities enter its territory in order to fulfill their respective adjudicative and prosecutorial roles under the Roaming ICC framework. Thus, when this type of clear cut violation occurs, the Roaming ICC State Party has its unquestionable territorial jurisdiction to adjudicate this infraction, and concurrently, the Regional and Presidential Authorities also legitimize their jurisdiction to adjudicate the suspect by linking itself, or said differently, by partnering itself with the State Party's definitive jurisdiction to adjudicate.

Although a majority of international crimes will occur in this manner described above—for instance, Rwanda, former Yugoslavia, Cambodia, Nazi Germany—in the absence of such a clear cut scenario, the Roaming ICC framework has other jurisdictional justification to adjudicate as well. In the case of a suspect fleeing the territory of the Roaming ICC State Party where the crime was committed or the territorial State Party clearly unwilling to investigate or prosecute, other Roaming ICC State Parties will have a jurisdictional basis for capturing and adjudicating the suspect if the suspect enters their territory, or for offering to accept the proceedings from the State Party unwilling to adjudicate the suspect. This jurisdictional basis spawns from the fact that the Roaming ICC jurisprudence would be a part of every Roaming ICC State Party's domestic law, and as already stressed, will be perfectly consistent from one country to another. As a consequence of every nation having the exact same Roaming ICC law, the concept of vicarious jurisdiction would exist for every State Party across the Roaming ICC network.

Vicarious jurisdiction possesses similar characteristics as universal jurisdiction, but is a distinct jurisdictional theory altogether. Under the concept of vicarious jurisdiction, a Roaming ICC State Party—State B—ends up prosecuting an individual who committed an international crime in another Roaming ICC State Party, State A. State B can prosecute this suspect because of the failure of State A—who initially possessed primacy of jurisdiction to adjudicate because the

391. BARRY E. CARTER ET. AL., INTERNATIONAL LAW 650-653 (4th ed. Aspen Publishers 2003) (highlighting the elements of territorial jurisdiction, and the power of territorial jurisdiction).

392. There could be circumstances where a Roaming ICC investigation/pre-trial goes on without the presence of the defendant(s) in custody. However, their presence in custody would be mandatory for trial to begin. For literary ease, this Note assumes for this example that the suspect(s) is in custody.

offense happened on its territory—to adjudicate the suspect warrants and triggers State B to step in and adjudicate the suspect in State A's place.[393] Vicarious jurisdiction, an concept present in German and Austrian jurisprudence,[394] differs from universal jurisdiction, because State B initially possesses a claim to adjudicate the suspect despite State A having primacy of jurisdiction.[395] State B has an initial claim to adjudicate the suspect, because the suspect breached State B's Roaming ICC laws, but with the operative events occurring in another Roaming ICC jurisdiction, in State A. Conceptually, the vicarious jurisdiction idea comes from the theory that the sovereign authority of a State to adjudicate the commission of an international crime that occurs in its territory passes to the international community, or another State, once the territorial State abrogates its sovereign duty to adjudicate recognized international crimes.[396] Vicarious jurisdiction would be a codified jurisdictional concept under the Roaming ICC, for all Roaming ICC State Parties would have the same domestic laws in regard to Roaming ICC law. As a result of this codification, the ability but denial of State A to prosecute a suspect for committing a Roaming ICC crime within State A, or the fleeing of this suspect from a violation in State A into State B, would justify and motivate State B in apprehending or offering to prosecute the individual for violation of Roaming ICC laws in State Party A. The motivation for State B to apprehend or to offer to prosecute this suspect comes from not only the suspect violating the Roaming ICC laws present in State A's jurisprudence, but the verbatim Roaming ICC laws in State B's jurisprudence as well. Otherwise, State B's failure to adjudicate this suspect would intrinsically undermine the validity of State B's Roaming ICC laws. Furthermore, vicarious jurisdiction would pass from Roaming ICC State Party to Roaming ICC State Party at each failure of any of the State Parties to apprehend and prosecute, so the suspect could face prosecution in State C, State D, and so on, never finding a safe haven.[397] As a result of codifying vicarious jurisdiction, the Roaming ICC framework still maintains jurisdictional prowess in the face of fleeing suspects or a Roaming ICC State Party unwilling to prosecute.

The more complex situation is where a Roaming ICC State Party refuses to investigate or prosecute a Roaming ICC crime that occurred within its territory, the suspect staying within this State Party's territory, *and* this State Party is unwilling to extradite the suspect to another Roaming ICC State Party for prosecution. However, this is an issue of potential military or hostile intervention into the territory of the Roaming ICC State Party unwilling to extradite, because the only

393. *See* Bottini, *supra* note 13, at 512-13.

394. Strafgesetzbuch [StGB] [Penal Code] Allgemeiner Teil [AlT] § 7 (2) 1-2 (Germany); Strafgesetzbuch [StGB] [Penal Code] Allgemeiner Teil [AlT] § 65 (1)-(3) (Austria).

395. *See* Bottini, *supra* note 13, at 512-13.

396. *See* 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138-39, U.N. Doc. A/RES/60/1 (Oct. 24, 2005), *available at* http://daccess-ods.un.org/TMP/7325911.html; Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, xi-xiii (Dec. 2001), *available at* http://www.iciss.ca/pdf/Commission-Report.pdf; Sammons, *supra* note 49, at 122-24.

397. Bottini, *supra* note 13, at 511-12 (discussing that a major goal of international criminal law is to eliminate safe haven, which unfortunately are a reality in today's world).

way the suspect could face justice is if another State Party breaches the territorial sovereignty of the unwilling State Party in order to capture this individual. The Roaming ICC is not designed to answer a dilemma of military or hostile intervention, because the Roaming ICC is an international criminal enforcement mechanism, not an end run around acts of war. No system is capable of solving all international criminal situations – including the Roaming ICC – considering the unpredictable and overtly political nature of world affairs. Plainly put, the Roaming ICC can only go so far.

Nevertheless, the Roaming ICC system would incorporate normative measures to handle a situation like this, and could resort to its vast membership to bring about an acceptable solution. If a State Party refuses to cooperate with the Roaming ICC, fails to live up to their Roaming ICC contractual obligations, or refuses to extradite a suspect to a Roaming ICC State Party willing to prosecute, the initial step would be to allow individual State Parties to engage the uncooperative State Party in diplomacy. There are two valid reasons why other State Parties would be motivated to persuade the uncooperative State Party to change its way. First, all Roaming ICC State Parties will have a vested interest in maintaining the integrity of the Roaming ICC system, because it takes just one State Party being allowed to skirt its Roaming ICC contractual obligations to make the whole system unreliable and tarnished for the rest. Hence, the State Parties that want the Roaming ICC to work and/or are relying on the Roaming ICC to work when needed will have a self-interest in making other States Parties cooperate. Second, the idea of vicarious jurisdiction would persist even in this above described scenario, because the suspect has still violated the laws of *all* Roaming ICC State Parties, but unfortunately in a State Party unwilling to do anything about it.[398] Allowing a State Party to harbor an individual accused of violating a law that all nations have specifically adopted into their own domestic law directly undermines the validity of such a law; therefore, other Roaming ICC States Parties will want to persuade the uncooperative State Party to cooperate for everyone's benefit, least of which the persuading States' own benefit.

With these two reasons, other States will have plenty of diplomatic leverage and normative pressure to exert over an uncooperative State Party. Roaming ICC State Parties can inform the uncooperative State Party that not only is the State Party doing damage to its reputation by failing to live up to its contractual Roaming ICC obligations, but it is doing damage to its future ability to contract or have other States believe them at all in future negotiations of any sort. Furthermore, other State Parties can stake a claim over the harbored suspect pursuant to vicarious jurisdiction, which will put the uncooperative State Party on notice that there is much too lose and nothing to gain by staying uncooperative. As a precautionary measure, States could insert "Roaming ICC compliance" provisions into trade, economic cooperation, maritime, or any other kind of

398. The only true way around a scenario like this would be to include a provision in the Roaming ICC agreement that all States will obey extradition requests, but such a provision would most likely be unacceptable to many sovereign States.

bilateral or multilateral treaties such that the benefit of a treaty will only flow to a country if the country is compliant with the Roaming ICC. As a last resort, the Roaming ICC would be able to refer the situation to the UN Security Council for resolution, which could include economic and diplomatic sanctions imposed upon the uncooperative State Party. As can be seen, despite the complexity of this type of situation, the Roaming ICC will still have plenty of concrete normative options at is disposal to solve this dilemma.

Finally, the Roaming ICC jurisdiction to adjudicate will be substantially simpler than the current ICC, because the current ICC's confusing and complex referral/deferral/complimentarity process will be eradicated under the Roaming ICC. The potential for political firestorms between current ICC State Parties and the Prosecutor's Office regarding future deferrals will be extremely high, and such political skirmishes will inevitably delay justice from happening. One of the main legal arguments put forward by the U.S. against the current ICC is the discretionary ability of the Prosecutor to avoid deferring a case to a national court, thus allowing the ICC to proceed with an internal ICC proceeding against the wishes of a State Party.[399] In contrasts, deferrals will never be an issue under the Roaming ICC framework, because the actual judicial proceeding will take place in the affected forum, or in a neighboring State Party. As such, politics about deferrals and over-zealous Prosecutors will not be an issue that will bog down the Roaming ICC.

2. Internal Strength: A Reliable Jurisdiction to Enforce

Despite amendments within the Rome Statute to require cooperation with the current ICC's investigation and prosecution of suspects,[400] the Rome Statute cannot guarantee that the current ICC will not be plagued with the same enforcement problems that faced the *ad hoc* tribunals, particularly the ICTY. Evidence gathering, evidence protection, witness and victims security, witness summoning, enforcement of arrest warrants, the ability to arrest, and other necessary elements to any judicial proceeding were far from foregone conclusions for the *ad hoc* tribunals,[401] and the ICC is vulnerable to the same issues.[402] Cooperation agreements, while in principle seem to be a solution, cannot be trusted when it comes to international criminal matters, because it leaves far too much discretion with sovereign States. Although these necessary elements are never completely certain of occurring in any international judicial proceeding, the mere fact that a Roaming ICC proceeding will be administered primarily by a Roaming ICC State Party within that State Party's territory increases the odds that every part of an investigation, pre-trial, and trial will transpire. Seldom is it a worry in the

399. Fact Sheet, *supra* note 334 (pointing out that a major U.S. objection to the ICC is the Prosecutor's ability to avoid having to defer a case).

400. *See* Rome Statute, *supra* note 207, pt. 9.

401. *See* Cervoni, *supra* note 72, at 510.

402. *See* Mark B. Harmon & Fergal Gaynor, *Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings*, 2 J. INT'L CRIM. JUST. 403, n.26 (2004) (forecasting that the ICC mechanism will experience the same enforcement flaws that plagued the ICTY).

domestic criminal context if a trial will take place, because of doubts that the suspect can be arrested, or evidence can be secured, or prosecutors will want to uphold the law. The goal of the Roaming ICC is to bring that level of certainty to the enforcement of international criminal law by relying on the State Party's experience, knowledge, and overall ability to facilitate an investigation and judicial proceeding within its own borders.

3. True Sense of Justice

The practice of prosecuting international crimes outside of the area in which the crimes took place has been substantially discredited.[403] Using the two *ad hoc* tribunals as examples, the prosecution of international criminals in The Hague and in Arusha created a multitude of problems in the affected areas of Rwanda and the former Yugoslavia. These severely traumatized populations felt disconnected from the proceedings, unaffected by the sentencing of these criminals thousands of miles away.[404] The supreme goal of criminal justice is to make the affected community whole and the ICTR and ICTY not only missed accomplishing this goal, but caused joint opposition among the affected communities against the tribunals.[405] There are no assurances that the current ICC's proceedings will not produce the exact same feelings among the communities ravaged by genocide, or the like, because the ICC will also be operating, from a distance, in The Hague. However, the Roaming ICC would not encounter such issues. The proceeding of any violation of the Roaming ICC laws would most likely take place where the crimes occurred. In the few situations where a Roaming ICC investigation and prosecution were to take place elsewhere, such proceedings would invariably take place in a nearby Roaming ICC State Party. Due to this feature of the Roaming ICC, affected communities will be more likely to rally around the proceedings, instead of opposing them.

4. Caseload Capacity and Pooling of Resources

As it stands today, the ICC, as a centralized, singular institution, holds neither the resources nor capability to handle adequately a plethora of simultaneous international criminal cases.[406] If international criminal cases start to pile up, the current ICC's inability to take on a large number of cases at once, and do so effectively, will force the ICC to make one of two unattractive decisions: it can put a finite limit on its caseload capacity, and hope national jurisdictions fill the void or; allow itself to become overloaded, which inevitably will result in undesirable consequences, such as delays in justice for the afflicted communities and

403. Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 300-08 (2003); Lipscomb, *supra* note 376, at 193-99.

404. *See Developments in the Law—International Criminal Law: II. The Promises of International Prosecution,* 114 HARV. L. REV 1957, 1971-72 (2001) (emphasizing that having the prosecution forum far away from the affected communities, such as the scenario with the ICTY and ICTR, creates a void in justice, and galvanizes the communities against the tribunals).

405. *Id.* at 1972.

406. *See* Bottini, *supra* note 13, at 547 (describing the logistic problems that the ICC will face in light of how the ICC is set up).

unreasonably long detention periods for suspects.[407] In contrast to the current ICC, the Roaming ICC is built to handle any number of international criminal cases simultaneously given that the Roaming ICC is a decentralized entity that possesses all the resources of its State Parties, its Regional Authorities, and the Presidential Authority. As such, the burden of simultaneous international criminal cases will be dispersed; therefore, Roaming ICC cases could occur in Somalia, Brazil, Albania, Vietnam, and Mexico all at once without one case detracting or harming another.

Another benefit of being larger and more decentralized than the current ICC is that the Roaming ICC would have a much larger pool of money to facilitate its investigations and trials, and create a funding mechanism that all States would support. While unnecessary here to determine the exact percentage each Roaming ICC Authority would pay towards financing a Roaming ICC proceeding, the breadth and the setup of the Roaming ICC structure will make certain that the financial fears that hang over the head of the Sierra Leone, Cambodia, and East Timor tribunals will not be replicated in Roaming ICC system.[408] In most circumstances, a Roaming ICC proceeding would be drastically cheaper than any other international tribunal, because a Roaming ICC investigation and trial would rely on the already financed, preexisting legal infrastructure of the State Party where the trial would take place to fund a majority of the trial and investigation costs. For example, the State Party's Judges, Prosecutors, investigators, administrative officers, court rooms, detention facilities, and so on would already be paid for, and would simply be reassigned to a Roaming ICC case. Conversely, the Regional and Presidential Authorities would be financially responsible for the peoples, goods, and services each Authority contributed towards the fulfillment of its obligations in a Roaming ICC proceeding, and additionally, would partly reimburse the forum State Party for the Roaming ICC's use of its preexisting legal infrastructure. [409] This reimbursement would give the forum State Party extra incentives to hold up their end of the Roaming ICC agreement as well.

In situations where a Roaming ICC proceeding takes place in a State Party where the international crimes did not occur, the afflicted State Party would be responsible for paying in part the hosting State Party.[410] Such an arrangement would give a financial enticement to the hosting State to accept the role as forum

407. *See* Howard Morrison, *Experimental Justice: Do International Tribunals Work?*, 3-4, http://www.leginetcy.com/articles/Experimental%20Justice-Do%20International%20Tribunals%20Work.pdf (discussing the delay of justice issues associated with the *ad hoc* tribunals).

408. AsiaPacific, *supra* note 369, at 1; Rob Sharp, *Funding Crisis Threatens Khmer Rouge Trials*, THE INDEP., Mar. 12, 2008, *available at* http://www.independent.co.uk/news/world/asia/funding-crisis-threatens-khmer-rouge-trials-794486.html; *see* Sierra Leone Agreement, *supra* note 368, art. 6 (stating the Sierra Leone Tribunal will be financed by voluntary contributions by States, which to a legal mind, is incomprehensible, considering that allows for the possibility of a trial to end because of a lack of money).

409. Each Regional Authority would be funded in part by the States in the Region, and the Presidential Authority would be funded by all State Parties.

410. The Roaming ICC agreement would not prohibit any other financial agreement between the three Authorities, as long as it furthers the goal of international justice.

State Party, and allow for the afflicted State to put its resources towards punishing those responsible. Finally, as a last resort, if any State Party is or becomes financially or technically unable to fulfill their obligations in a Roaming ICC proceeding, the Regional and Presidential Authorities would assume the investigation and judicial responsibilities as well as the financial burden of the indigent State Party, if need be.

E. Attractive to Opponents of the Current ICC

For State and non-State opponents of the current ICC, like the U.S., the Roaming ICC alternative is less objectionable to the principle of sovereignty, and therefore, more likely to be adopted by all nations. The Roaming ICC effectively addresses two primary concerns shared by opponents of the current ICC: the infringement of an external, independent international institution on the sovereignty of the State, and the legitimacy of the jurisdiction asserted in an international criminal prosecution. For many States, like the U.S., it is unnerving to envision an independent, foreign legal entity potentially having international criminal jurisdiction over its citizens, mainly because the sovereign State would be cut out of having direct involvement in the judicial proceedings.[411] The hallmark of the Roaming ICC is that it is a conceptually decentralized court that temporarily "creates itself" within the territory of the crime or any State Party, so the Roaming ICC cannot be labeled external or foreign. Additionally, the Roaming ICC depends on the State Party in which it sits not only for the performance of a majority of investigatory and judicially necessary functions, but also on the allocation of domestic Judges and Prosecutor from the territorial State Party. Therefore, the Roaming ICC is not an independent hegemony asserting its authority over sovereign States. Instead, the Roaming ICC is set up to incorporate the sovereign influence of the State Party in which it sits, which includes everything from

411. One of the U.S.' grounds for opposing the ICC is that the ICC may attempt to gain jurisdiction over its soldiers, military personnel, high ranking military leaders, or foreign policy makers working abroad. Bolton Speech, *supra* note 329. This is a uniquely American concern, for no country maintains a military force abroad to the extent that the U.S. does. Under the Roaming ICC, it is imaginable that a U.S. military official or civilian foreign policy maker could be investigated and potentially prosecuted in a foreign Roaming ICC State Party. However, there are safeguards and incentives in place that would appease both the U.S. and international community if such a scenario would take place. First, the Roaming ICC State Party that initially began an investigation or prosecution against the U.S. military official could extradite the U.S. military official to the U.S., and the entire Roaming ICC process could take place in the U.S. The sending country would be assured, by the structural safeguards within the Roaming ICC agreement, that the U.S. and the international community would adjudicate the U.S. military official together, rather than the U.S. simply taking the soldier back with no assurances that any judicial proceedings will take place at all. Second, regardless if Roaming ICC proceeding took place in the extraditing country or in the U.S., it would be the exact same proceeding, so there would be no worry that the U.S. would hold a kangaroo court of some sort. The inverse of this, if the U.S. official were to stay in the Roaming ICC State Party that initially investigated or prosecuted the U.S. military official, and the U.S. did not seek extradition, the U.S. would at least be assured that the exact same proceedings would take place regardless where the Roaming ICC proceedings occurs. Additionally, because the U.S. would take part in the negotiations surrounding the jurisprudence of the Roaming ICC, the U.S. would indirectly influence all future Roaming ICC proceedings wherever they took place, even if it was a Roaming ICC prosecution against a U.S. general in Burundi, for instance.

domestic investigators to a sitting domestic Judge. Essentially, the Roaming ICC provides State Parties with both a sense of ownership over the Roaming ICC proceedings taking place within its territory and with "checks and balances" on the amount of influence that the Roaming ICC Presidential and Regional Authorities can assert, yet still maintaining a system whereby the international community can counteract any misgivings on the part of the State Party.

Much to the liking of opponents of the current ICC, through the adoption of the Roaming ICC laws into the domestic jurisprudence of all State Parties and the dependence of a Roaming ICC proceeding on the domestic State Party to help "run the show", the Roaming ICC proposal adds an element of territorial legitimacy to the entire process of enforcing international criminal law. Objections as to the legitimacy of universal prescriptive and adjudicative jurisdiction used by the current ICC are answered, because the Roaming ICC attaches itself onto the unquestioned territorial power of the State Party, and the State Party's own internal, pre-existing mechanisms, to enforce Roaming ICC's criminal laws.

F. Attractive to Proponents of the Current ICC

It has been emphasized that the Roaming ICC proposal will gain the support of State and non-State opponents of the current ICC, because it calls for the active involvement of the sovereign State as a "check and balance" on unadulterated international intervention and provides jurisdictional legitimacy not found in the current ICC. However, their support will not come at the cost of losing the support of those States and non-States that are proponents of the current ICC. A chief reason that the proponents of the current ICC support the current ICC and not domestic courts applying international criminal law on their own is that the current ICC ensures that the location of the trial will not impact the substance of or the manner in which the law is applied, and allow for a completely transparent proceeding. Even though a Roaming ICC trial could take place in Mongolia or Chile, the Roaming ICC framework would also ensure the consistent application of the same rules and laws, and provide a transparent trial for the whole world to witness.

First of all, a Roaming ICC proceeding will not be completely left to the devices of the State Party, for every Roaming ICC proceeding will include the prosecutorial and judicial participation of the Roaming ICC Presidential and Regional Authorities. Secondly, given that each Roaming ICC proceeding will apply the exact same substantive law wherever the trial takes place, there will be no concern that a genocide trial in Sudan, for instance, will apply different substantive international criminal laws against genocide than the laws applied at a genocide trial in Laos. The manner in which a Roaming ICC proceeding occurs will not be of concern either, because the same procedural standards and practices —for instance, rights of defendants, pre-trial process, etc.—will be used during every Roaming ICC investigation, pre-trial, trial, and appeal regardless of its geographic location. Moreover, a future Roaming ICC trial in Nicaragua can use a past Roaming ICC trial in Indonesia for guidance, because every Roaming ICC Judge, Prosecutor, and Defense attorney will know that it can rely on Roaming ICC case law in light of the standardized laws and rules applied at every Roaming ICC proceeding. In light of regional and international officials participating in

many facets of a Roaming ICC proceeding, all Roaming ICC proceedings will supply a level of transparency that is not provided to the international community attempting to monitor a domestic State practicing international criminal law on its own. Such a level of transparency will deter Roaming ICC State Parties from actively undermining a Roaming ICC proceeding as well. Even if a State Party did disrupt a Roaming ICC proceeding, the level of transparency afforded would give the international community opportunity to bear legal and political pressure on the State Party to alter its harmful policies.

All of these above attributes, which are very important to proponents of the current ICC, are only realized if all the world's States agree to the substantive and procedural laws to be used by the Roaming ICC framework, and subsequently enact them into every State Parties' domestic law. Yet, the hard work and years that it might take to accomplish such a task will ensure legal consistency within the Roaming ICC framework, and accordingly, alleviate any apprehension that Roaming ICC judicial proceedings will be varied and unfair.

V. CONCLUSION: APPEASES BOTH SIDES OF THE DEBATE

As this Note has traced the development of international criminal law, specifically the international institutions trusted to adjudicate and enforce them, the consistent theme throughout has been the battle between sovereignty and the international rule of law. No matter what the answer to the riddle on enforcing international criminal law may be, it is undeniable that the conflict between sovereignty and the international rule of law sits squarely on top of the answer. Regardless of the approach, the clash between sovereignty and international rule of law has to be resolved in order to reach the solution.

For centuries, the dominant thought on enforcing international criminal law assuming that countries even agreed on what international criminal law is has surrounded compromise. How far can we push sovereignty on the creation of an international criminal system without sovereign States walking away from the table? How far can we undermine international rule of law in creating an international criminal enforcement mechanism until those that support international criminal law walk away from the table? The magical middle ground was sought, but never to be attained. The focus must switch from compromise to engineering an international criminal enforcement mechanism that does not need to stomp on either sovereignty or the international rule of law in order to become a reality.

The Roaming ICC has, at the very least, made strides towards achieving this engineering feat.[412] Tallying all of the advantages of the Roaming ICC, both proponents of sovereignty and proponents of the international rule of law will get an international criminal system that will appease both sides.[413] For the proponents

412. Obviously, the Roaming ICC proposal is in a rude, preliminary form as offered in this Note. Yet, the theory still has the potential to accomplish what it claims it can accomplish.

413. Throughout this Note, the proponents of sovereignty and the opponents of the current ICC are one in the same. Conversely, proponents of the international rule of law and the proponents of the current ICC are one in the same as well.

of the international rule of law, the Roaming ICC will be an effective, comprehensive, and transparent international criminal system that is capable of delivering consistent and fair judicial proceedings to every corner of the globe. More importantly, the Roaming ICC will provide advantages, such as ability to avoid disenfranchising the local population and a better ability to sustain a judicial proceeding, that international rule of law proponents wish were included in the current ICC. For the defenders of sovereignty, the Roaming ICC will not be a foreign entity bent on snatching their citizens away to a far away court. Rather, the Roaming ICC will hold judicial proceedings right in the sovereign State Party's own territory and allow their own Judges and their own Prosecutor to assert influence over every prosecutorial and judicial decision. Most beneficial to the proponents of both sovereignty and the international rule of law is the jurisdictional solution offered by the Roaming ICC, for the Roaming ICC jurisdiction to adjudicate will either be grounded in a Roaming ICC State Party's territorial jurisdiction[414] or vicarious jurisdiction,[415] thus creating a quasi-universal jurisdictional system that both sides of the divide will embrace.

Many of the components of the Roaming ICC proposal may not be earth-shattering concepts in their own right, but the Roaming ICC is a conceptual amalgamation of these components that is truly unique.[416] The Roaming ICC takes many of these already used ideas, and extrapolates on them. The Roaming ICC seizes on many of these already discussed concepts, and institutionalizes them. The end result is a coherent system of international criminal enforcement that ensures the highest level of realistic certainty that sovereign States will work with the international community to fight international crime on a consistent and uniform basis, wherever such crime occurs.[417]

Finally, the reality of creating a Roaming ICC is not far-fetched, for the substantive law necessary to create the Roaming ICC is already in existence. True, time will be needed to fashion a set of procedural laws that all Roaming ICC State

414. Pleases the opponents of the ICC.

415. Pleases the proponents of the ICC.

416. For instance, international criminal prosecution via universal jurisdiction is not a ground-breaking concept, but accomplishing the end result of that concept through an agreement that codifies an alliance between the use of territorial and vicarious jurisdiction is a ground-breaking idea. Hybrid tribunals is not a revolutionary idea, but creating an international criminal enforcement mechanism that would allow for the creation of hybrid tribunals overnight through an agreement between sovereign States and the international community is revolutionary.

417. Another way to think of the Roaming ICC is that it is a structural guarantee on the promise of suppression convention. In an ideal world, suppression convention would be *all* the world would need to fight international crimes, because every State would prosecute international crimes that occurred within their territory or extradite the international criminal to a State that would prosecute them. Yet, sovereign States were free to disobey their obligations set forth in these suppression conventions, because there was no real consequences for disobeying. The Roaming ICC creates a framework agreement between all sovereign States and the international community that gives motivation to sovereign States to allow for the joint adjudication of international crimes by the State itself and the international community—represented by the Presidential and Regional Authorities—within their territory, and further ensures that these adjudications will always takes place, and always be fair and consistent.

Parties will accept, and even more time to allow the adoption of the entirety of Roaming ICC's laws into the domestic law of each nation. However, the time necessary to accomplish these feats is a small price to pay if the end result is a system that both proponents of sovereignty and the international rule of law will support. And an even smaller price to pay for a system that is capable of and designed to eradicate international crime in a State-centric world of international law.

THE EVOLUTION AND ENDPOINT OF RESPONSIBILITY: THE FCPA, SOX, SOCIALIST-ORIENTED GOVERNMENTS, GRATUITOUS PROMISES, AND A NOVEL CSR CODE

Aaron Einhorn[*]

Multinational corporations (MNC) have emerged as engines of global development. Over the past fifty years, the number of multinational corporations, the value of multinationals' investments in foreign countries, and the amount of multinationals' wealth have increased dramatically.[1] MNCs in developed countries have taken advantage of well educated and inexpensive labor in developing countries, allowing them to cut costs and generate higher profit margins.[2] The end of the Cold War ushered previously closed economies across Eastern Europe, the former Soviet Union, and China into the global economy, opening untapped markets.[3] Trade liberalization, engineered by the World Trade Organization (WTO) and its member states, has fostered new business relationships and eased corporate access to markets, goods, and services. Foreign direct investment (FDI), defined as "a lasting interest by a resident entity in one economy... in an entity resident in an economy other than that of the investor," has grown exponentially.[4] In 1989, global FDI stood just below $200 billion.[5] Seven

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1. *See* Earl H. Fry, *North American Economic Integration: Policy Options*, 9 POLICY PAPERS ON THE AMERICAS 8, 2 (2003) (estimating also that, in 2002, approximately 65,000 multinationals operated 850,000 subsidiaries around the world); Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 57 (2002) (highlighting that, while nineteen countries had revenues greater than General Motors and only three corporations were among the world's twenty-eight largest economic entities in 1991, in 2000 only seven countries had revenues greater than General Motors and fifteen corporations were among the world's twenty-eight largest economic entities); *Inward FDI Flows by Host Region and Economy (1970-2005), in* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2005: TRANSNATIONAL CORPORATIONS AND THE INTERNATIONALIZATION OF R&D (2005) (reporting that in 1970 FDI worldwide totaled $13.4 billion whereas in 1985 it totaled $58.0 billion and in 2005 totaled $945 billion, down from a high of $ 1.4 trillion in 2000); *see also* PAUL HIRST & GRAHAME THOMPSON, GLOBALIZATION IN QUESTION (Polity Press 2d ed. 1999) (discussing how, between 1945 and the present, the world economy has become more closely integrated).

2. PETER DICKEN, GLOBAL SHIFT: RESHAPING THE GLOBAL ECONOMIC MAP IN THE 21ST CENTURY 26-51 (4th ed. 2003).

3. *See* JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 180-94 (2003) (discussing how a transition to market economies has had positive and negative effects on the economies of former communist states); Peter Wilkin, *Revising the Democratic Revolution – Into the Americas*, 24 THIRD WORLD Q. 655, 656 (2003). One hundred and thirteen countries joined the World Trade Organization at its inception in 1995. One-hundred fifty states are now members.

4. ORG. ECON. COOPERATION & DEV., OECD BENCHMARK DEFINITION OF FOREIGN DIRECT

years later FDI doubled to just below $400 billion, and by the year 2000 reached $1.1 trillion.[6] While only ten countries' FDI totals surpassed $10 billion in 1985, corporations in thirty three countries invested over $10 billion abroad in the year 2000.[7]

The wealth corporations have enjoyed has not existed in isolation. Rather, greater corporate wealth has produced greater corporate power that corporations have exercised in both positive and negative manners.

Greater corporate power has cultivated unprecedented advances in health and education over the past forty years.[8] Corporations have developed new medicines, revolutionized transportation[9], provided employment to millions, and generally have assisted in raising the standard of living worldwide.[10] Corporations also have contributed to rapid technological development, particularly in the area of communications. Fiber optic systems and the internet have revolutionized the speed at which ideas and knowledge can flow within countries and across oceans,[11] forging a synergistic relationship between corporations and technology that has propagated new technologies and fed corporate power.[12]

At the same time, greater corporate power has been associated with a host of problems. The wealth multinationals have brought to some countries has bypassed many other countries.[13] In some cases, the activities of multinational corporations in developing countries have retarded economic growth.[14] Multinationals have been accused of committing various human rights violations, such as carrying out extra-judicial killings and employing child labor.[15] Corporate activities in

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INVESTMENT 7 (3d ed. 1996), *available at* http://www.oecd.org/dataoecd/10/16/2090148.pdf

5. *Inward FDI Flows by Host Region and Economy (1970-2005)*, *supra* note 1.

6. *Id.*

7. DICKEN, *supra* note 2, at 56.

8. STIGLITZ, *supra* note 3, at 248.

9. DICKEN, *supra* note 2, at 91-93 (discussing how rapid modernization of transportation systems has contributed to economic globalization).

10. STIGLITZ, *supra* note 3, at 248.

11. DICKEN, *supra* note 2, at 95.

12. *Id.*

13. While this paper is concerned with the overall growth of FDI as that growth informs corporate power, rather than with an analysis of whether and to what extent FDI is evenly distributed and contributes to or hinders growth in certain countries, it is important to note that FDI flows to developing countries are not even and that growth stemming from the internationalization of corporations has bypassed many countries. While countries such as Thailand, Singapore, and Peru have enjoyed large amounts of capital inflows and impressive growth, countries throughout Africa, Central America, South America, Central Asia, Southeast Asia, the Middle East, and the Pacific Rim have seen relatively stagnant and even decreasing FDI totals, and have not shared in the economic growth and poverty reduction that many other countries have enjoyed. *See Inward FDI Flows by Host Region and Economy (1970-2005)*, *supra* note 1.

14. *See, e.g.*, Ronaldo Munck, *Neoliberalism, Necessitarianism and Alternatives in Latin America: there is no alternative (TINA)?*, 24 THIRD WORLD Q. 495, 501-03 (2003) (discussing how the collapse of Argentina's economy in 2001 is largely attributable to the neoliberal prescriptions and the rapid influx of multinational corporations through privatization of the economy).

15. *See e.g*, James Glanz & Sabrina Tavernise, *Security Firm Faces Criminal Charges in Iraq*, N.Y. TIMES, Sept. 23, 2007.

developing countries have been associated with environmental degradation, dangerous work conditions, and mistreatment of indigenous people.[16] However, in contrast to developed states, developing states have not successfully combated the harms that have flowed from increased corporate power.[17] A number of factors – including weak domestic and international legal institutions, non-responsive heads of state, the "race to the bottom,"[18] and developed countries' economic dominance – have prevented developing states from effectively addressing the negative economic and social impacts of corporate activities.[19]

The inability of many developing states to manage these problems has sparked calls for a code of social responsibility that is able to regulate multinational corporations.[20] Countries and corporations have responded to these cries. The United States and member States of the European Union (EU), the Organisation for Economic Co-operation and Development (OECD), the United

16. *See* Sarah M. Hall, *Mulitnational Corporations' Post-UNOCAL Liabilities for Violations of International Law*, 34 GEO. WASH. INT'L L. REV. 401, 416-17 (2002); Douglass Cassel, *International Security in the Post-Cold War Era: Can International Law Truly Effect Global Political and Economic Stability? Corporate Initiatives: A Second Human Rights Revolution*, 19 FORDHAM INT'L L. J. 1963, 1964-66 (1996); AMARTYA SEN, DEVELOPMENT AS FREEDOM 128 (Anchor Books 1999) (stating that the rationale of the market mechanism, by which corporations operate, is geared to private goods, like clothes and food, rather than public goods, like the environment).

17. In the United States, for example, from 1897 to 1934 the United States Supreme Court struck down numerous state laws regulating working conditions under the due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution. The Supreme Court's rulings held that the states cannot use their police powers to enact legislation that interferes with employers' and employees' rights to contract. As examples, the Supreme Court invalidated a New York statute forbidding employment in bakeries for more than 60 hours a week, struck down labor legislation forbidding discrimination by employers for union activity and prohibiting employers from requiring employees to sign "yellow dog" contracts, and ruled that a federal statute prescribing minimum wages for women violated due process. Many of the issues that the courts refused to address – unhealthy working conditions, discrimination, and wages – are problems plaguing developing countries. In 1937, however, the Court reversed fifty years of precedence. After its landmark opinion in West Coast Hotel Co. v. Parrish, the Supreme Court began upholding as constitutional legislation that protected workers' rights and consumers' rights and that interfered with the previously unfettered rights of business. Statutes that set a state minimum wage for women, prohibited the shipment in interstate commerce of "filled milk", fixed maximum fees for employment agencies, and regulated opticians were now held to be constitutional. Since 1937, the judiciary and legislators have established huge bodies of law that protect workers and consumers and that regulate corporate power. *See* JESSE H. CHOPER ET AL, CONSTITUTIONAL LAW 274-304 (9th ed. West Publishing, 2001).

18. Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 671-74 (1998). Discussions on bilateral investment treaties often refer to a "race to the bottom." Competition over foreign direct investment (FDI) can be fierce. This competition prompts countries to offer increasingly attractive incentives to corporations in order to receive FDI. Thus, country A may allow company XYZ to repatriate profits. Country B may then allow company XYZ to repatriate profits and may lower taxation of profits to 2%. In turn, country A lowers taxation to 1% and frees company XYZ from pollution controls. This competition for FDI via added concessions will continue until the costs of such concessions exceeds their benefits.

19. *See generally* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

20. *Id.* at 448.

Nations (UN), and the International Labor Organization (ILO) have developed codes that place non-binding social responsibilities on corporations.[21] In addition, many corporations voluntarily have drafted and adopted their own codes of conduct, though, similar to measures drafted by intergovernmental organizations (IGO), these codes are not legally binding.[22]

Because existing codes of conduct have limited ability to prevent and redress corporate human rights abuses, the debate on whether to draft and how to structure a binding corporate social responsibility (CSR) code continues. This article enters that debate. It discusses events and circumstances occurring within the United States, other countries, and the international community which, when viewed in light of one another, suggest that states and corporations are moving towards creating an enforceable code of corporate social responsibility. After discussing these forces, this article offers an organizational framework for developing a CSR code.

The article's first section examines corruption and bribery. It discusses problems corruption creates in developed states and charts the evolution of U.S. and international measures to combat corruption; measures which have placed greater responsibilities upon corporations. The article's second section takes a similar approach, first discussing broad corporate governance concerns that surfaced over the past decade and then considering how the Sarbanes-Oxley Act (SOX), and similar measures in Europe, have addressed these concerns.

After charting how the United States and European Union have placed greater responsibilities upon corporations, the article analyzes a different force contributing to the development of a CSR code. The article's third section explains how the rise of socialist-oriented (SO) governments in Latin America will advance progress towards a code of corporate social responsibility. Next, the article's fourth section discusses human rights abuses and social harms that have accompanied the spread of MNCs through developing states. This section then analyses the various CSR measures the international community and multinational corporations have adopted to counter these harms. The paper's fifth section explains why the CSR measures that states, intergovernmental organizations, and multinationals have enacted cannot successfully regulate corporate activity and proposes a new and potentially useful framework for developing a CSR code. Last, the sixth and final section ties together the information presented in previous sections, summarizes how that information supports the article's thesis, and draws conclusions.

I. CORRUPTION: PROBLEMS AND RESPONSES

While corruption is more pervasive in developing countries, it also produces serious problems in developed states.[23] When the magnitude of multinational

21. *See infra* notes 205, 212, 215, 218.

22. *See infra* notes 229, 230, 231, 232.

23. In developing states, corruption's effects are more varied and acute than in developed states. Corruption undermines effective business practices and corrodes political institutions, leading to tainted judiciaries, vote buying, venal police more concerned with collecting bribes than pursuing criminals,

corporations' bribery of foreign officials came to light in the United States during the 1970s, Congress passed the Foreign Corrupt Practices Act (FCPA or the Act). In 1998, the U.S. adopted a second round of amendments to the FCPA, enlarging its jurisdiction and expanding its substance. By the turn of the century, states worldwide had joined the battle against bribery, ratifying several anti-corruption treaties. Analysis of how anti-corruption measures have evolved reveals that, over time, states have placed greater responsibilities on corporations and have cut more deeply into corporate power. This trend of imposing greater responsibilities on corporations, when viewed in light of other events such as enactment of the Sarbanes-Oxley Act, the rise of SO governments in Latin America, and the development of non-binding CSR codes, suggests a binding code of corporate social responsibility lies on the horizon.

A. Problems Caused by Corruption

Corruption breeds various problems. When multinational corporations bribe foreign officials to obtain contracts or secure more relaxed regulations, their venal activities undermine effective business practices.[24] Bribery "can damage a company's image, lead to costly lawsuits, cause the cancellation of contracts, and result in the appropriation of valuable assets overseas."[25] Bribery also inflates operating expenses, creating new costs companies would not absorb if they obtained business legally, and wastes valuable resources.[26] Instead of devoting earnings to research and development, infrastructure, or shareholder dividends, companies that pay bribes direct profits into foreign officials' pockets.[27] As is common in other regulatory contexts, a "race to the bottom" ensues.[28] Officials demand greater and greater sums. Corporations, competing with one another for business, pay larger and larger bribes for access to markets and favorable treatment until the marginal benefit of new payments decreases to zero.[29] Such behavior is not good for business.

In 1976, more than four hundred U.S. companies admitted to paying over $300 million in bribes to foreign officials during the first half of the 1970s.[30] Gulf Oil Corporation admitted to paying bribes in various countries, including $4

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and weak rule of law. In-depth discussion of the effects of corruption in developing states is beyond the scope of this paper. For a detailed analysis, *see* Tim Harford, *Why Poor Countries are Poor*, 37 REASON 32, 36 (2006); Robert Zuzowski, *Corruption in Post-Communist Europe: Immorality Breeds Poverty*, 30 J. OF SOC. POL. AND ECON. STUD. 9, 12-15 (2005).

24. *See* H.R. REP. NO. 95-640, at 4-5 (1977).

25. *Id.* at 5.

26. Steven R. Salbu, *Information Technology in the War Against International Bribery and Corruption: The Next Frontier of Institutional Reform*, 28 HARV. J. ON LEGIS. 67, 70-71 (2001).

27. *Id.* at 70-71.

28. *Cf.* Sol Picciotto, *Linkages in International Investment Regulation: The Antinomies of the Draft Multilateral Agreement on Investment*, 19 U. PA. J. INT'L ECON. L. 731, 751 (1998) (stating that smaller countries with weaker economies often feel pressured to offer incentives that they cannot afford).

29. *Cf.* Guzman, *supra* note 18, at 671-74. Although Guzman discusses the race to the bottom in the context of bilateral treaties, the concept applies to the spiraling effects of corruption.

30. H.R. REP. NO. 95-640, at 4

million to the governing political party in South Korea; General Tire & Rubber Company admitted to bribes in Algeria, Mexico and Venezuela; and Exxon Corporation disclosed bribes in fifteen countries, including $19 million in Italy alone.[31] Most dramatically, the SEC discovered that Lockheed Aircraft Corporation, at that time the largest defense contractor in the United States, had been bribing prime ministers, presidents, and other high-ranking political figures in several countries.[32] By the end of 1976, updated studies revealed four hundred and fifty U.S. companies had paid over $450 million in bribes since the decade began.[33]

This pervasive corruption sparked government action. In 1977, officially recognizing that "corporate bribery is bad business" and that it affects "the very stability of business overseas" as well as "our domestic competitive climate,"[34] the United States Congress passed the Foreign Corrupt Practices Act to reign in corruption.[35]

B. The U.S. Response to Corruption: The Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act consists of two general sections: one that establishes record keeping and internal controls regulations and another that prohibits bribery of foreign officials. While the FCPA was first passed in 1977, amendments in 1988[36] and 1998 refined the Act and broadened its scope. Comparison of the 1977 and 1998 versions reveals the United States has placed greater and greater responsibilities on corporations.

1. The FCPA at the Time of its Passage

The first section of the FCPA creates record keeping and internal controls standards. Since the Act's inception, this section has required issuers with securities registered under the Securities and Exchange Acts to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly

31. DONALD R. CRUVER, COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT: A GUIDE FOR U.S. FIRMS DOING BUSINESS IN THE INTERNATIONAL MARKETPLACE 4 (2d ed. 1999).

32. *Id.* at 4-5; Peter W. Schroth, *The United States and the International Bribery Conventions*, 50 AM. J. COMP. L. 593, 595-96 (2002).

33. CRUVER, *supra* note 31, at 3.

34. FOREIGN CORRUPT PRACTICES AND DOMESTIC AND FOREIGN INVESTMENT IMPROVED DISCLOSURE ACTS OF 1977, REPORT OF THE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS, S. REP. NO. 95-114, at 4, *available at* http://www.usdoj.gov/criminal/fraud/fcpa/1977sen.htm [hereinafter S. REP. NO. 95-114].

35. Pub L. No. 95-213, 91 Stat. 1494; 15 U.S.C. §§ 78m, 78dd-1, 78dd-2.

36. Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185, 189-92 (1994). The 1988 amendments made several changes to the Act. Some changes moderated the FCPA's anti-bribery restrictions, such as inclusion of an affirmative defense allowing a corporation to avoid prosecution if its payments to a foreign official are allowed under the written laws of that foreign official's country. Other amendments made the Act more punitive, such as a significant fine increase. While these amendments are notable, this paper does not discuss the 1988 amendments. Rather, this paper is concerned with the 1998 amendments, as those amendments not only expanded the FCPA's scope more significantly, but also are the most recent amendments and, as such, inform the trend towards imposing greater responsibilities upon corporations.

reflect the transactions and dispositions of the assets of the issuer."[37] The Act broadly defines records to include "accounts, correspondence, memorandums, tapes, disks, paper, books, and other documents or transcribed information of any type...."[38] Both qualitative omissions, such as omission of a questionable payment to a foreign official, and qualitative omissions, such as mischaracterization of a payment, are proscribed under the record keeping provision.[39] Since 1977, the FCPA also has required issuers to "devise and maintain a system of internal accounting controls" in order to improve corporate accountability and allow corporate directors, officers, and shareholders to detect and prevent the unlawful use of an issuer's assets.[40] An issuer violates this provision if it knowingly circumvents or fails to implement a system of internal accounting controls.[41]

The accounting and control provisions, one of the first federal laws to mandate compliance with corporate governance standards, have allowed the SEC to detect, investigate, and prosecute bribery.[42] For example, in 1996 the SEC brought an action against Montedison, an Italian industrial conglomerate whose shares are traded domestically within the United States.[43] The SEC alleged Montedison violated the record keeping provision by disguising several hundred million dollars in bribes to Italian politicians.[44] Five years later Montedison settled with the SEC, agreeing to pay a $300,000 fine.[45] Similarly, in 1997 the SEC filed a complaint against Triton Indonesia, a subsidiary of Triton Energy Corporation, alleging it "failed to devise and maintain an adequate system of internal accounting controls."[46] Triton agreed to a final judgment that enjoins it from violating the FCPA and exacts a $300,000 fine.[47] More recently, the SEC issued a cease-and-

37. 15 U.S.C. §78m(b)(2)(A); *see also*15 U.S.C. §78m(b)(7) (defining "reasonable detail" as "such level of detail... as would satisfy prudent officials in the conduct of their own affairs.").

38. 15 U.S.C. §78c(a)(37).

39. CRUVER, *supra* note 31, at 26-27.

40. 15 U.S.C. §78m(b)(2)(B). The Act specifically states that issuers must "provide reasonable assurances that: (i) transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles . . .; and (iii) access to assets is permitted only in accordance with management's general or specific authorization . . . . "

41. 15 U.S.C. §78m(b)(5).

42. Schroth, *supra* note 32, at 599-601 (noting that these are the first laws requiring corporate compliance with corporate governance standards, and giving the SEC the ability to regulate the internal management of domestic corporations); *see also* H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 7, 9-16 (1998) (dubbing the FCPA "a significant expansion of the SEC's regulatory authority over the internal management of public corporations subject to the Commission's jurisdiction.").

43. SEC v. Montedison, Litigation Release No. 16948, Accounting and Auditing Enforcement Release No. 1380 (March 30, 2001) *available at* http://www.sec.gov/litigation/litreleases/lr16948.htm.

44. *Id.*

45. *Id.*

46. SEC v. Triton Energy Corp., Litiation Release No. 15266, Accounting and Auditing Enforcement Release No. 890 (Feb. 27, 1997) *available at* http://www.sec.gov/litigation/litreleases/lr15266.txt.

47. *Id.*

desist order and levied a $100,000 fine against Chiquita Brands as a result of internal control violations by its Colombian subsidiary, Banadex.[48]

While the record keeping and internal controls measures have helped to combat bribery, the heart of the FCPA lies in its anti-bribery provisions. Since 1977, Congress has applied the FCPA's anti-bribery provisions to both "issuers" and "domestic concerns."[49] An issuer is any entity that must register under Section 12 of the Securities and Exchange Act or that must file reports under Section 15(d) of that Act.[50] Domestic concerns include U.S. nationals; a juridical entity organized under U.S. law or with its principal place of business within the United States; and any officer, agent, employee, or stockholder of a domestic concern.[51] Under this definition, a domestic concern employed by a foreign entity or subsidiary is amenable to suit under the anti-bribery provisions while his or her principal or employer is not.[52]

Although Congress expanded the FCPA in 1998, since 1977 Congress has required the government to prove the same five, general elements to establish a violation of the Act. First, the entity making a payment must act corruptly.[53] While the Act does not define the term "corruptly", the Eighth Circuit has stated that, for purposes of the FCPA, a corrupt act is "intended to induce the recipient to misuse his official position or to influence someone else to do so" or is "done voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means."[54]

Second, the entity must use the mail or any other means of interstate commerce in furtherance of an offer, payment, or promise to pay anything of value.[55] Cases not involving the FCPA have held that, under the federal mail fraud statute, a use of the mail that is merely "incident to an essential part of the scheme" constitutes use of the mail.[56] More directly, a United States citizen who traveled to Nigeria with six gold watches intended as bribes for Nigerian officials made use of interstate commerce.[57] These expansive definitions impose heightened responsibilities upon corporations.

The third element the government must establish is an offer, payment, or promise of value made to any foreign official, foreign political party, party official,

48. In re Chiquita Brands International, Inc., FCPA Civil Enforcement Actions by the Securities and Exchange Commission at 3, *available at* http://www.usdoj.gov/criminal/fraud/fcpa/append/ix/appendixb.pdf.

49. STUART H. DEMING, THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 7 (ABA Publishing, 2005).

50. 15 U.S.C. §78dd-1(a).

51. DEMING, *supra* note 49, at 8-9.

52. *Id.* at 9.

53. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

54. United States v. Liebo, 923 F.2d 1308, 1312 (8th Cir. 1991).

55. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

56. Schmuck v. United States, 489 U.S. 705, 710-11 (1989).

57. Alder v. Federal Republic of Nigeria, 1998 U.S. Dist. LEXIS 23419 (S.D. Cal. 1998), *affirmed* 219 F.3d 869, 878 (9th Cir. 2000).

or foreign candidate for political office.[58] This element is satisfied if an issuer or domestic concern knows that a portion of an offer, payment, or promise of value, although not directly being used to bribe a foreign official, will be re-given or re-promised to a foreign official, foreign political party, foreign party official, or foreign candidate for political office.[59] Thus, this element imposes vicarious liability on issuers and domestic concerns, holding issuers and domestic concerns responsible for the acts of third parties who are not amenable to suit under the Act. For purposes of vicarious liability, knowledge exists if an issuer or domestic concern is aware a third party is committing bribery, firmly believes that bribery is substantially certain to occur, or perceives a high probability that bribery will occur.[60]

Vicarious liability demands greater corporate responsibility; compels more scrupulous oversight of a parent company's subsidiaries, agents, and affiliates; and holds multinationals accountable when they fail to discharge their obligations. For example, in 2004 the SEC lodged a complaint against Vetco Gray, Inc., a foreign corporation traded publicly in the U.S.[61] The complaint alleged Vecto Gray was vicariously liable for payments it made to its foreign subsidiaries because it knew the subsidiaries used the payments to secure oil contracts in Nigeria, Angola, and Kazakhstan through bribery.[62] Vecto Gray agreed to a $5.9 million settlement the day the SEC filed its complaint in Federal District Court.[63] Similarly, if an issuer or domestic concern makes a payment to a foreign sales agent while consciously disregarding information suggesting the agent will use that money to make an improper payment, the issuer or domestic concern likely has violated the Act's vicarious liability provision.[64]

Since 1977, the fourth element of the anti-bribery regulations has required payments to be made for the purpose of influencing an official act or decision; inducing the official to do any act in violation of his lawful duty; or inducing an official to use his power to affect a government act or decision.[65] The issuer or domestic concern need not offer payment for the purpose of influencing the foreign official's own government. Rather, pursuant to the Act's broad language, if an issuer or domestic concern pays a foreign official for the purpose of influencing the U.S. government or a private enterprise, and if all other elements are met, that payment would violate the Act.[66]

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58. 15 U.S.C. §§ 78dd-1(a)(1)(2), 78dd-2(a)(1)(2).

59. 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3).

60. 15 U.S.C. §§ 78dd-1(h)(3), 78dd-2(h)(3).

61. SEC v. ABB Ltd, Complaint at 2, July 6, 2004, *available at* http://sec.gov/litigation/complaints/comp18775.pdf.

62. *Id.*

63. SEC Sues ABB Ltd. in Foreign Bribery Case, Litigation Release No. 18775, July 6, 2004, *available at* http://sec.gov/litigation/litreleases/lr18775.htm.

64. DEMING, *supra* note 49, at 33.

65. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

66. DEMING, *supra* note 49, at 14.

Fifth, to establish a violation of the FCPA the government must prove the issuer or domestic concern, in offering a payment, sought to obtain or retain business for any person.[67] This sweeping language has made it easier to address "the concern of Congress with the immorality, inefficiency, and unethical character of bribery...."[68] Two cases illustrate this point. First, in *SEC v. Monsanto*, the SEC concluded that Monsanto's authorization of $50,000 in illicit payments from an Indonesian consulting firm to a senior Indonesian official, in exchange for repeal of legislation that had adversely affected Monsanto's business, constituted a payment offered to assist in obtaining business.[69] Similarly, in *United States v. Kay* the Fifth Circuit stated that "Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person."[70] The court held that bribes paid to customs officials in order to receive reduced customs and tax rates fall within the Act's proscription if "the bribery was intended to produce an effect-here, through tax savings-that would 'assist in obtaining or retaining business.'"[71]

2. The 1998 Amendments

In 1998, Congress amended the FCPA to conform to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).[72] The 1998 amendments broadened the Act's jurisdiction and substance, permitting the government to investigate and prosecute more acts of corruption. This enlargement reflects acknowledgement that deeper, more extensive measures are necessary to regulate corporate activities, and comports with the United States' and international community's pattern of placing greater responsibilities upon multinational corporations.

The 1998 amendments made three important changes to the Foreign Corrupt Practices Act. First, the amendments greatly enlarged the Act's jurisdiction over U.S. nationals and foreign persons. With regard to U.S. nationals, the Act added a new subsection stating that:

> "[i]t shall also be unlawful for any issuer organized under the laws of the United States... or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, *to corruptly do any act outside the United States* in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of... subsection (a)... for the purposes set forth therein, *irrespective of*

67. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

68. U.S. v. Kay, 359 F.3d 738, 749 (5th Cir. 2004).

69. SEC v. Monsanto Company, SEC Sues Monsanto Company for Paying a Bribe, Litigation Release No. 19023 (Jan. 6, 2005) *available at* http://www.sec.gov/litigation/litreleases/lr19023.htm.

70. Kay, *supra* note 68, at 755.

71. *Id.* at 756.

72. CRUVER, supra note 31, at 74.

> *whether such issuer... officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce....*"[73] (emphasis added).

This subsection expands the FCPA's nationality jurisdiction. Now, the SEC can investigate and prosecute issuers and persons acting on behalf of issuers regardless of whether the mails or interstate commerce are used in any way.[74] Accordingly, if a corporate executive acting on behalf of an issuer, while in a foreign county, orally offered to fly a foreign official and his family to Spain for vacation in exchange for the foreign official's opposition to a new minimum wage law, the executive's offer would violate the Act even though he neither made the offer in the United States nor utilized the mail or interstate commerce. [75]

The 1998 amendments also broadened the Act's jurisdiction over foreign persons. Before 1998, foreign issuers organized under U.S. law were the only foreign entities over whom the United States could assert jurisdiction.[76] Since the amendments, the U.S. can exercise jurisdiction over any person who violates the Act while in U.S. territory.[77] This expansion strengthens the SEC's ability to combat corruption[78] and is consistent with the United States' and international community's trend of placing greater responsibilities on corporations.

A recent SEC action against an Indonesian national illustrates the Act's expanded jurisdiction. In 2001, the SEC and the Department of Justice filed a joint civil injunction in U.S. District Court against KPMG Siddharta Siddharta & Harsono (KPMG-SSH), an Indonesian accounting firm, and against Sonny Harsono, a partner in the firm.[79] The complaint alleged Mr. Harsono agreed to pay an Indonesian tax official $75,000 in order to reduce the official's tax assessment against one of KPMG-SSH's clients.[80] Soon after it initiated an action, the SEC entered an uncontested final judgment against the defendants.[81]

The 1998 amendments also broadened the Act's substance in two important ways. First, whereas the FCPA previously was limited to payments made for the purpose of "influencing" or "inducing" an "act or decision," it now also proscribes payments made for the purpose of "securing any improper advantage."[82] This language captures more conduct than the 1977 version and helps to prevent false claims that a corporation made payments for a legal purpose. For example, payments made to have the first bid on a government contract, or to arrange a

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73. 15 U.S.C. §§ 78dd-1(g); *see also* 78dd-2(i), 78dd-3(a).

74. *See id.*

75. *See id.*

76. Pub L. No. 95-213, 91 Stat. 1494.

77. 15 U.S.C. § 78dd-3.

78. *See* Brown, *supra* note 42, at 19, 29-30.

79. United States & SEC v. KPMG Siddharta Siddharta & Harsono, Litigation Release No. 17127 (Sept. 12, 2001) *available at* http://www.sec.gov/litigation/litreleases/lr17127.htm.

80. *Id.*

81. *Id.*

82. 15 U.S.C. §§ 78dd-1(a)(3)(A)(iii), 78dd-2(a)(3)(A)(iii), 78dd-3(a)(3)(A)(iii).

favorable location for a factory, likely would be made for the purpose of "securing any improper advantage" and violate the Act.[83]

Second, while the Act always has prohibited payments to foreign officials, the 1998 amendments expanded the definition of "foreign official" to include "any officer or employee... of a public international organization, or any person acting in an official capacity or on behalf of any such... public international organization."[84] By defining "foreign official" to include representatives of international organizations, Congress has recognized that international organizations play a vital role and their officials are susceptible to bribery.

C. International Anti-Corruption Measures

The international community has joined the fight against corruption. Over the past ten years, several IGOs have implemented anti-bribery conventions. The OECD, recognizing that "bribery... raises serious moral and political concerns, undermines... economic development, and distorts international competitive conditions," drafted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions [85] Likewise, the Inter-American Convention Against Corruption (IA Convention), ratified by thirty three Latin American and Caribbean states, stresses that "fighting corruption strengthens democratic institutions and prevents distortions in the economy."[86] The Council of Europe Criminal Law Convention on Corruption (CoE Convention), ratified by fifty two countries,[87] and the United Nations Convention Against Corruption (UN Convention), which one hundred forty countries have signed though only fifty one have ratified, express similar concerns.[88] Regulations in these conventions in some ways exceed regulations in the FCPA.

Each of these conventions requires signatories to cooperate in fighting corruption. The OECD Convention requires states to "provide prompt and effective legal assistance" to one another.[89] Signatories must cooperate with criminal investigations, non-criminal investigations, and other proceedings that fall within the scope of the Convention.[90] The UN Convention and the IA Convention incorporate similar duties. The UN Convention obliges states to furnish one another with as much legal assistance as their domestic laws allow.[91] Article XIV of the IA Convention requires Parties to provide "mutual technical cooperation",

83. *Id.*

84. 15 U.S.C. §§ 78dd-1(f), 78dd-2(h)(2), 78dd-3(f).

85. Convention on Combating Bribery of Foreign Officials in International Business Transactions pmbl., Dec. 18, 1997, S. TREATY DOC. NO. 105-43, 37 I.L.M. 1 [hereinafter OECD Convention].

86. Inter-American Convention Against Corruption pmbl., Mar. 29, 1996, 35 I.L.M. 724 [hereinafter IA Convention].

87. Council of Europe Criminal Law Convention on Corruption, Jan. 27, 1999, 38 I.L.M. 505 [hereinafter CoE Convention].

88. United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. Doc. A/RES/58/4 (Oct. 31, 2003), *reprinted in* 43 I.L.M. 37 (2004), *available at http://www.unodc.org/unodc/en/treaties/CAC/index.html* [hereinafter U.N. Convention].

89. OECD Convention, *supra* note 85, at art. 9.

90. *Id.*

91. U.N. Convention, *supra* note 88, at art. 46.

which includes sharing knowledge of how to fight corruption most effectively.[92] Collectively, these provisions demonstrate that countries worldwide are committed to closely regulating multinationals' activities within their borders.

Each of these conventions also requires signatories to establish systems for monitoring compliance.[93] OECD states must create "a programme of systematic follow-up to monitor and promote full implementation of the Convention."[94] The UN Convention creates a "Conference of the States Parties to the Convention," which must develop processes for reviewing compliance and exchanging ideas on how to further the Convention's goals.[95] The CoE Convention simply requires signatories to "monitor the implementation of th[e] Convention," while the Follow-up on the Inter-American Convention Against Corruption and its Program for Cooperation require signatories to review compliance with the IA Convention periodically.[96] These monitoring systems, absent from the FCPA, illustrate the international community's commitment to fighting corruption and regulating MNCs more closely.

D. Conclusion

Corruption undermines efficient business practices and wastes valuable resources. Efforts to combat corruption have intensified gradually. The United States first outlawed corporate bribery of foreign officials in 1977 with passage of the FCPA. Since then, the U.S. has placed greater and greater anti-corruption responsibilities on corporations, broadening the Act's jurisdiction and expanding its substance. States worldwide have followed suit, adopting treaties which, in some areas, exceed the FCPA's exacting standards. When the evolution of anti-corruption measures is viewed in light of the development of heightened corporate governance standards, and in light of events such as the rise of socialist-oriented governments in Latin America and the passage of non-binding CSR measures, the creation of a corporate social responsibility code appears on the horizon.

II. BEHIND SOX: REASONS FOR IMPOSING EVEN MORE CORPORATE RESPONSIBILITY

At the start of the 21st century, broad corporate governance problems captured the attention of the United States and the international community. Responses to these problems, such as the Sarbanes-Oxley Act and similar measures developed by the United Kingdom and the European Union, established new corporate governance and management systems, and placed greater responsibilities upon corporations. Analysis of these corporate governance regulations, when viewed in

92. IA Convention, *supra* note 86, at art. XIV.

93. U.N. Convention, *supra* note 88, at art. 63; CoE Convention, *supra* note 87, at art. 24; OECD Convention, *supra* note 85, at art. 12; Follow-up on the Inter-American Convention Against Corruption and its Program for Cooperation AG/RES. 1784 (XXXI-O/01), *reprinted* in 41 I.L.M. 244 (2002).

94. OECD Convention, *supra* note 85, at art. 12.

95. U.N. Convention, *supra* note 88, at art. 63.

96. CoE Convention, *supra* note 87, at art. 24; Follow-up on the Inter-American Convention Against Corruption and its Program for Cooperation AG/RES. 1784 (XXXI-O/01), *reprinted* in 41 I.L.M. 244 (2002).

light of the evolution of anti-corruption legislation, the rise of socialist-oriented governments in Latin America, and the development of non-binding CSR measures, reveals the international community is moving towards a binding CSR code.

A. Broad Corporate Governance Problems

Corporate governance problems at the beginning of the twenty-first century undermined democratic institutions and weakened confidence in the U.S. economy.[97] While these problems varied in character and severity, combined they contributed to investment losses, the closure of many businesses, and the weakening of the U.S. and global economies.[98]

The main corporate governance problem was deceitful accounting practices, such as those employed by Enron and other corporations.[99] While Enron grew tremendously during the 1990s and early part of the twenty-first century, it obtained much of its profits through fraudulently constructed transactions.[100] To improve its financial appearance to investors, Enron fabricated special purpose entities that operated as partnerships with outside interests, allowing Enron to treat them as independent entities, remove them from its consolidated balance sheet, and hide losses.[101] Arthur Anderson, Enron's auditors, approved these "creative compliance" techniques that were designed to impassion investors and deceive the public.[102] Shortly after Enron filed for bankruptcy, investigations revealed these entities were concealing $13.15 billion in debt and an additional $27 billion in liabilities.[103] Enron's collapse was not an isolated incident. In 2002, WorldCom admitted it had overstated its earnings by $11 billion and declared bankruptcy while claiming $110 billion in assets, the largest bankruptcy in American

97. Justin O'Brien, *Governing the Corporation: Regulation and Corporate Governance in an Age of Scandal and Global Markets*, *in* GOVERNING THE CORPORATION 3 (Justin O'Brien ed., 2005).

98. *See* J.R. Romanko, *The Way We Live Now: 6-9-02: Salient Facts; Down from the Peaks*, N.Y TIMES, June 6, 2002, at 34 (citing an unemployment rate in April, 2002, of 6% compared to 3.9% in April, 2000); Daniel Altman, *U.S. Jobless Rate Increases to 6.4%, Highest in 9 Years*, N.Y. TIMES, July 4, 2003, at A1; Scott Bernard Nelson, *Fed Holds Rates Steady – For Now Revises Stance, Calls U.S. Economy Fragile*, BOSTON GLOBE, Aug. 14, 2002, at D1 (quoting the federal reserve as saying, "[t]he softening in the growth of aggregate demand that emerged this spring has been prolonged in large measure by weakness in financial markets and heightened uncertainty related to problems in corporate reporting and governance.").

99. Enron Corporation began as a natural gas company, expanded its operations worldwide, pressed into other industries, and was touted as a model for the new, competitive, corporate America.

100. DAVID SKEEL, ICARUS IN THE BOARDROOM: THE FUNDAMENTAL FLAWS IN CORPORATE AMERICA AND WHERE THEY CAME FROM 175-76 (Oxford University Press, 2005).

101. Peter T. Muchlinski, *Enron and Beyond: Multinational Corporate Groups and the Internationalization of Governance and Disclosure Regimes*, 37 CONN. L. REV. 725, 730-31 (2005). Enron's use and proliferation of SPEs grew out of SEC guidelines stating that corporations can treat SPEs independently under accounting practices if an owner of a company that does business with the SPE contributes an equity investment of at least 3% of the SPE's assets and if the independent owner maintains control over the SPE.

102. Doreen McBarnet, *After Enron: Corporate Governance, Creative Compliance and the Uses of Corporate Social Responsibility*, *in* GOVERNING THE CORPORATION 209 (Justin O'Brien ed., 2005).

103. Jonathan Shirley, *International Law and the Ramifications of the Sarbanes-Oxley Act of 2002*, 27 B.C. INT'L & COMP. L. REV. 501, 502-03 (2004).

history.[104] Similar events unfolded at Global Crossing, a company that invested in fiber optic cables and filed for bankruptcy in January, 2002 with billions of dollars in assets and liabilities.[105] Authorities also uncovered hidden transactions and veiled debts outside the balance sheet of Adelphia Inc., a prominent cable company.[106]

Another serious corporate governance problem for many corporations was their auditor selection processes. Before SOX, a company's chief financial officer (CFO) usually chose an outside accounting firm to audit the company.[107] However, most big accounting firms not only performed audits, but also earned significant revenue through consulting. By 1998, Wall Street's major accounting firms garnered only 38% of their revenue through audits.[108] This change practically transformed auditing firms into "consulting companies that did a little auditing on the side,"[109] in an arrangement that reposed considerable power in CFOs. Whereas CFOs previously hesitated to discharge auditors who did not approve certain corporate structures and transactions out of fear that discharge would prompt closer analysis of accounts, concern among investors, and market backlash, by the year 2000 CFOs could threaten to cut consulting business if auditors refused to approve questionable transactions.[110] As auditors grew reluctant to investigate suspect accounting practices, the balance of power shifted heavily towards CFOs and their corporations.

A final corporate governance problem that has drawn attention in recent years is vast increases in executive compensation. While CEOs of S&P 500 companies earned thirty times more than non-managerial workers in 1970, by 1996 those same CEOs were earning two hundred and ten times more than the average worker, with the gap widening further in recent years.[111] The significance of these figures does not lie in the sheer difference in pay. Rather, their importance also stems from the fact that, unlike professional athletes, actors, and others whose salaries also have grown considerably in recent years, CEOs "essentially set their own compensation."[112]

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104. SKEEL, *supra* note 100, at 175-76.

105. Shirley, *supra* note 103, at 503-04.

106. *Id.* at 504.

107. SKEEL, *supra* note 100, at 179.

108. *Id.* at 166-67.

109. *Id.* (noting that in 2000 and 2001, Arthur Anderson, Enron's now defunct accounting firm, earned $25 million a year from Enron for its consulting services and an additional $25 million for audits).

110. *Id.*

111. Randall S. Thomas, *Should Directors Reduce Executive Pay?*, 54 HASTINGS L.J. 437, 440-41 (2003); David Leonhardt, *The Imperial Chief Executive is Suddenly in the Cross Hairs*, N.Y. TIMES, June 24, 2002, at A1 (stating that top CEOs made approximately 410 times what the average worker was paid in 2001); Ken Belson, *Executive Pay: A Special Report; Learning How to Talk About Salary in Japan*, N.Y. TIMES, April 7, 2002, at 12 (highlighting that executives in Japan make approximately 12 times what the average worker is paid in Japan, whereas executives in the United States made approximately 180 times what the average worker is paid in the U.S.).

112. Stephen M. Bainbride, Book Note, 83 TEX. L. REV. 1615, 1619 (2005) (reviewing LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE

These practices prompted close scrutiny of corporate activities, undermined confidence in corporations, and hurt corporate earnings. As concerns grew, corporate ills damaged private citizens and the economy.[113] In July 2002, as the negative impacts of poor corporate governance were spreading across the United States,[114] Congress passed the Sarbanes-Oxley Act "to address the systemic and structural weaknesses affecting our capital markets which were revealed by repeated failures... in recent months and years," and "[to] increase corporate responsibility."[115]

B. The Sarbanes-Oxley Act: A New Code of Corporate Responsibility

The Sarbanes-Oxley Act has been heralded as "the most significant piece of securities legislation since the 1930s."[116] It has redefined the rules for publicly traded companies, instituting sweeping changes in corporate governance and accounting practices.[117] More specifically, auditor controls, certification procedures, and internal controls requirements have placed greater responsibilities on corporations.[118]

One way SOX has tightened oversight of corporations is through stricter regulation of audit committees. Until recently, most audit committees convened

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COMPENSATION (2004)).

113. *See* Brian Kim, *Sarbanes Oxley Act*, 40 HARV. J. ON LEGIS. 235, 237 (2003) (noting that twenty thousand Enron executives lost $1.2 billion from their 401(k) plans during Enron's dissolution); John Paul Lucci, *Enron: The Bankruptcy Heard Around the World and the International Ricochet of Sarbanes-Oxley*, 67 ALB. L. REV. 211, 212 (2003) ("[f]inancial scandals involving WorldCom, Qwest, Global Crossing, Tyco, and Enron ultimately cost shareholders $460 billion."); Ethan G. Zelizer, *The Sarbanes-Oxley Act: Accounting for Corporate Corruption?*, 15 LOY. CONSUMER L. REV. 27, 30 (2002) (stating that WorldCom's accounting and governance problems resulted in the loss of 20,000 jobs); *see also* SEN, *supra* note 16, at 94 (explaining that unemployment's negative effects spread far beyond loss of income).

114. *See* Romanko, *supra* note 98 at 34 (citing an unemployment rate in April, 2002, of 6% compared to 3.9% in April, 2000); Altman, *supra* note 98, at A1; Nelson, *supra* note 98, at D1 (quoting the federal reserve as saying "[T]he softening in the growth of aggregate demand that emerged this spring has been prolonged in large measure by weakness in financial markets and heightened uncertainty related to problems in corporate reporting and governance.").

115. S. REP. NO. 107-205 (2002).

116. SEC. & EXCH. COMM'N, STUDY PURSUANT TO SECTION 108(D) OF THE SARBANES-OXLEY ACT OF 2002 ON THE ADOPTION BY THE UNITED STATES FINANCIAL REPORTING SYSTEM OF A PRINCIPLES-BASED ACCOUNTING SYSTEM, *available at* http://www.sec.gov/news/studies/principlesbasedstand.htm#2.

117. ROBERT R. MOELLER, SARBANES-OXLEY AND THE NEW INTERNAL AUDITING RULES 3 (2004).

118. *See* THOMAS E. HARTMAN, THE COST OF BEING PUBLIC IN THE ERA OF SARBANES-OXLEY 3 (2006) (discussing a survey of corporate executives which reveals that a large majority of executives regard SOX's corporate governance and public disclosure reforms as "too strict", as companies with an annual revenue under $1 billion experienced a 174% increase in "the cost of being public" from 2001-2005); Jonathan Treadway, *New Regulations Affecting the Banking Industry: Problems with Potential Application of Selected Provisions of the Sarbanes-Oxley Act of 2002 to Small, Non-Public Banking Organizations*, 8 N.C. BANKING INST. 165, 183 (2004) (describing how many small banking firms have decided not to go public because of the extra expenses that accompany SOX's pervasive regulations); William J. Carney, *The Costs of Being Public After Sarbanes-Oxley: The Irony of "Going Private"*, 55 EMORY L.J. 141, 141 (2005) (stating that section 404 compliance cost an average of $823,200 in 2004).

infrequently and merely rubber stamped the auditor's work.[119] Many audit committee members even appeared personally tied to their companies' CEOs.[120] Sarbanes-Oxley changed this relationship by requiring corporations to develop independent audit committees.[121] Now, under Section 301, audit committee members cannot hold any position within a company other than their position as a member of the audit committee.[122] Likewise, audit committee members may not "accept any consulting, advisory, or other compensatory fee from the issuer" nor "be an affiliated person of the issuer" or its subsidiaries.[123] Each audit committee has plenary responsibility for appointing, overseeing, and setting compensation for its corporation's public accounting firm.[124] Also, each audit committee must craft a procedure for funneling employees' complaints of questionable accounting practices to corporate officers.[125] Furthermore, each audit committee must have at least one "financial expert," or explain its reasons for not doing so.[126]

In addition, Section 201 of SOX prohibits external auditors from providing additional, non-audit services, including bookkeeping, financial information systems design, appraisals, investment advice, and "any other service that the Board determines, by regulation, is impermissible."[127] Collectively, Sections 201 and 301 create a new corporate governance framework and place new responsibilities on corporations.

The Sarbanes-Oxley Act's certification provision also tightens regulation of corporations. This provision requires each issuer's principal executive and principal financial officer(s) to certify that he or she has reviewed each annual or quarterly report and that, based on the officer's knowledge, all material facts in the report are true, no material facts are omitted, and all financial information is correct "in all material respects."[128] By forcing corporate officers to certify their corporation's financial condition, this provision undercuts an executive's ability to claim ignorance of faulty financial statements and exacts greater corporate responsibility.

The Sarbanes-Oxley Act's internal controls provisions impose SOX's deepest, most comprehensive regulations.[129] Pursuant to Section 302, each

119. MOELLER, *supra* note 117, at 59.

120. *Id.* at 59.

121. Roberta S. Karmel, *The Securities and Exchange Commission Goes Abroad To Regulate Corporate Governance*, 33 STETSON L. REV. 849, 873 (2004).

122. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 776 § 301 (2002) (codified in scattered sections of 1, 15, 18, 28, and 29 U.S.C.A.) [hereinafter SOX].

123. *Id.* at 776, § 301.

124. *Id.*

125. *Id.*

126. *Id.* at 790, § 407. To qualify as a financial expert one must have experience auditing "comparable issuers", "experience with internal accounting controls", and "an understanding of audit committee functions."

127. *Id.* at 771-72, § 201.

128. *Id.* at 777, § 302.

129. *See* 68 Fed. Reg. 36636 (June 18, 2003) (defining internal controls as "a process designed by, or under the supervision of . . . principal executive and financial officers . . . and effected by the . . .

principal executive and principal financial officer must confirm that he or she has designed internal controls.[130] These controls must ensure the principal executives and principal officers know material financial information about the corporation and its subsidiaries.[131] Principal executives and principal officers also must confirm they have evaluated the effectiveness of these controls.[132] In addition, Section 302 requires each principal executive and principal officer to confirm that any significant cause for alarm over the adequacy of the controls has been disclosed.[133]

In addition, pursuant to Section 404, corporate management must: 1) state in their annual reports management's responsibility for "establishing and maintaining an adequate internal control structure;" 2) assess the effectiveness of the internal controls in their annual reports; and 3) have their public accounting firms "attest to, and report on" management's assessment.[134]

Comparison of the FCPA's and SOX's internal controls provisions reveals the trend towards placing greater responsibilities on corporations. The FCPA's internal controls provisions, initially drafted thirty years ago, simply declare that issuers must design and maintain internal controls, but does not require evaluation or analysis.[135] Conversely, sections 302 and 404 of SOX together require corporate executives to state their responsibility for designing internal controls, to create such controls, to assess and evaluate these controls, and to draw conclusions about their effectiveness.[136] While the FCPA places responsibility for internal controls upon the corporation in general,[137] SOX specifically charges executive officers with internal controls duties.[138] Thus, internal controls have been transformed from a recitation of general duties lodged upon the corporation as a whole to a statement of specific duties[139] imposed on corporate executives in particular.

Although the audit committee, certification, and internal controls provisions have placed the greatest responsibilities on corporations, other sections of SOX have had a similar effect. An ethics provision requires corporations to "disclose whether or not, and if not, the reason therefor," they have "adopted a code of ethics

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board of directors . . . to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles . . . ").

130. SOX at 777, § 302.

131. *Id.*

132. *Id.*

133. *Id*; *see also* Final Rule: Certification of Disclosure in Companies' Quarterly and Annual Reports, Securities Act and Exchange Release Nos. 33-8124, 34-46427, IC-25722, 67 Fed. Reg. 57,726 (Aug. 29, 2002) (specifying that CEOs and CFOs may not delegate their Section 302 duties to any subordinate).

134. SOX at 789, § 404.

135. 15 U.S.C. §78m(b)(2)(B).

136. SOX at 777, § 301; SOX at 789 § 404.

137. 15 U.S.C. §78m(b)(2)(B).

138. SOX at 777, § 301; SOX at 789 § 404.

139. *See* 68 Fed Reg. 36636 (adopting rules for the implementation of Section 404).

for senior financial officers."[140] In addition, pursuant to section 402, corporations no longer may "extend or maintain credit... in the form of a personal loan to... any director or executive officer," even if done indirectly through a subsidiary.[141] This proscription creates new corporate responsibilities. Finally, Section 806 of Sarbanes-Oxley prohibits corporations and their constituents from discharging, demoting, suspending, harassing, threatening, or otherwise discriminating against any employee who informs the government of corporate conduct that may violate an SEC regulation or a federal law involving fraud against shareholders. This section also provides civil remedies to employees who allege discrimination and subsequently are sued by their employer,[142] federalizing state statutes protecting whistle blowers.[143] Section 806 shifts power from the corporation to its constituents, a change that is consistent with calls for corporations to assume a new set of corporate social responsibilities to their employees, communities, and environments.

C. Corporate Governance Measures in Other Countries

Two years after enactment of SOX, the United Kingdom and the European Union passed new corporate governance measures. These regulations, consistent with U.S. regulations, impose greater responsibilities upon corporations.

The United Kingdom's Companies (Audit, Investigation, and Enterprise) Act of 2004 (the Companies Act) severs close ties between corporations and auditing firms.[144] Although it does not forbid auditors from performing non-audit services like section 201 of SOX, it does empower the Secretary of State to pass regulations requiring corporations to disclose auditors' non-audit services.[145] The Companies Act also gives auditors unfettered access to company accounts, and allows them to require corporate executives to provide them with any information needed to perform their duties[146] In addition, pursuant to the Companies Act's certification provision, each corporate director must state in his director's report that, "so far as [he] is aware, there is no relevant audit information of which the company's auditors are unaware." The director also must certify he has taken all measures necessary for making himself "aware of any relevant audit information" and for establishing "that the company's auditors are aware of [such] information."[147] Other provisions set criteria for recognizing supervisory audit bodies, permit the Secretary of State to make grants to entities that issue accounting standards or investigate departures from accounting standards, and, with approval by the

140. SOX at 789, § 406; *see also* MOELLER, *supra* note 117, at 71-79 (discussing the efforts of many corporations to establish corporate wide ethics programs in order to increase external legitimacy, the risk environments that corporations face, the need for an ethics program, and how to establish such a program).

141. SOX at 787, § 402.

142. *Id.* at § 806.

143. Karmel, *supra* note 121, at 867.

144. Companies (Audit, Investigations, and Community Enterprise) Act of 2004, art. 7, *available at* http://www.opsi.gov.uk/acts/acts2004/40027--b.htm#7 [hereinafter Companies Act].

145. *Id.*

146. *Id.* at art. 8.

147. *Id.* at art. 9.

Secretary of State, empower individual investigators to compel the production of documents during investigations.[148]

The European Union also has adopted measures that place greater responsibilities on corporations. EU Council Directive 2006/43 (the Directive) includes several provisions affirming that auditors must operate independently of their employers. Member States must prohibit auditors from auditing companies with whom they have "any direct or indirect financial, business, employment or other relationship."[149] Also, owners and shareholders may not intervene "in the execution of a statutory audit in any way which jeopardises the independence and objectivity of the statutory auditor."[150] In addition, the Directive requires member states to "ensure that all statutory auditors and audit firms are subject to a system of quality assurance" that operates independent of the auditors and audit firms.

Section 101 of SOX establishes a non-profit organization, the Public Company Accounting Oversight Board, "to oversee audit of public companies... in order to protect the interests of investors...."[151] The Directive mandates the creation of a similar body. It calls for "a system of public oversight for statutory auditors and audit firms," which will "apply to all statutory auditors and audit firms" and "have ultimate responsibility for... the approval and registration of statutory auditors and audit firms, the adoption of standards on professional ethics... and... investigative and disciplinary systems."[152] By adopting these measures, the EU has followed the lead of the United States in placing greater responsibilities upon corporations.

D. Conclusion: Continued Progressive Placement of Heightened Responsibilities upon Corporations

Congress passed the Sarbanes-Oxley Act in response to corporate governance problems that arose in the United States during recent years. SOX tightens corporate structures, strengthens corporate governance, and places greater responsibilities on corporations than does the FCPA. Thus, U.S. regulation of corporate activities has escalated gradually and a similar trend exists internationally. Although less prescriptive than SOX, the Companies Act and the Directive also create new corporate governance standards. This evolution of placing greater responsibilities on corporations, when viewed in light of events such as the rise of socialist- oriented governments in Latin America, corporate rights abuses, and the passage of non-binding CSR codes, suggests the international community will develop a binding CSR code to govern the social impacts of corporate activities.

148. *Id.* at arts. 1, 16, 21.

149. Council Directive 2006/43, art. 22, 2006 O.J. (L 157) 87 (EC).

150. *Id.* at art. 24.

151. SOX at 750, § 101.

152. Council Directive 2006/43, *supra* note 149, at art. 32.

III. THE GROWTH OF SOCIALIST-ORIENTED GOVERNMENTS IN LATIN AMERICA

Following a wave of democratization in Latin America during the 1980s, many countries in Latin America adopted neoliberal economic policies.[153] Neoliberal policies reduce a country's economic protections and open its economy to the international marketplace with minimal government interference.[154] Such policies were recommended for developing countries by the International Monetary Fund, World Bank, and other leading international economic institutions during the 1990s.[155] In many cases, these institutions conditioned loans and assistance on countries' willingness to adopt austere macroeconomic fiscal policies, rapidly privatize state-owned businesses, and quickly liberalize capital markets.[156] Many Latin American countries followed these neoliberal mandates, curtailing social services,[157] removing restraints from capital markets, [158] and privatizing huge, state-owned industries.[159]

These measures succeeded for several years and helped to produce economic growth throughout Latin America.[160] Corporations invested heavily in Latin America during the 1990s. In 1990, inward FDI to Latin American countries totaled just over $10 billion.[161] Ten years later, inward FDI had jumped to $114 billion. [162] This spread of foreign corporations was partly attributable to neoliberal reforms, particularly rapid privatization of many state-run industries.[163] In Brazil, for example, over one hundred state-owned companies with a value of $61.5 billion were privatized during the 1990s.[164] Similarly, one hundred companies with a value of approximately $23 billion were privatized in Argentina during the 1990s.[165]

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153. THOMAS E. SKIDMORE & PETER H. SMITH, MODERN LATIN AMERICA 59 (2d ed., 1989) (highlighting the election of civilian presidents in Peru, Argentina, and Brazil during the 1980s and citing Chile as the only "major exception" to the general rule that Latin America had democratized by 1985).

154. STIGLITZ, *supra* note 3, at 6-8, 74.

155. *Id.* at 6-8.

156. *Id.*, at 53.

157. Sergio Cabrera Morales, *Las Noventa: Hacia la Segunda Década Perdida*, IN GLOBALIZACIÓN, EXCLUSIÓN Y DEMOCRACIA EN AMÉRICA LATINA 169-170 (Heinz Dieterich ed., 1997).

158. AUGUSTO DE LA TORRE ET AL., CAPITAL MARKET DEVELOPMENT: WHITHER LATIN AMERICA 8, 18 (2006), *available at* http://www.nber.org/books/IASE05/delatorre-et-al5-23-06.pdf.

159. SYBIL RHODES, SOCIAL MOVEMENTS AND FREE-MARKET CAPITALISM IN LATIN AMERICA 26-29 (2006) (discussing the rapid privatization of state-owned businesses, particularly the telecommunications industry, in Latin America during the 1990s).

160. *See* STIGLITZ, *supra* note 3, at 53 (stating that neoliberal policies initially sparked growth in Latin America); *Gross Domestic Product by Host Region and Economy (1970-2005)*, *in* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2005: TRANSNATIONAL CORPORATIONS AND THE INTERNATIONALIZATION OF R&D (2005).

161. *Inward FDI Flows by Host Region and Economy (1970-2005)*, *supra* note 5.

162. *Id.*

163. Germano Mendes de Paula et al., *Economic Liberalization and Changes in Corporate Control in Latin America*, 44 THE DEVELOPING ECONS. 467, 485-87 (2002).

164. *Id.* at 477-78.

165. *Id.*

However, soon after neoliberal policies produced growth in Latin America, they began to fail. The neoliberal prescription of cutting social spending in order to maintain macroeconomic health destroyed the social service infrastructures of many countries.[166] By the end of the 1990s, sluggish and in many cases negative economic growth had spread throughout the area.[167] Neoliberal reforms and extensive FDI received some blame for this economic downturn,[168] enabling leaders who espoused socialist-oriented policies to assume power in Latin America.[169] This trend began with the election of Hugo Chavez in Venezuela in 1999, and since has spread to eight countries in Central and South America.[170] The degree to which these countries follow socialist policies and values differs greatly.[171] However, each has adopted SO policies that show their interest in countering perceived U.S. dominance in the region, protecting workers' rights, safeguarding national resources, and maintaining control over their economies.[172]

Venezuela elected Hugo Chavez as President in 1999.[173] Since taking office, Chavez has spent billions of dollars on education and health care, and has made "life increasingly miserable for foreign – above all American – companies."[174] Most recently, Chavez announced plans to nationalize Venezuela's telecommunications and electricity industries, and to transform Venezuela into a socialist country.[175] Venezuela generally is considered the most SO country in

166. Anthony Hall, *From Fome Zero to Bolsa Familia, Social Policies and Poverty Alleviation Under Lula*, 38 J. LATIN AMER. STUDIES 689 (2006).

167. *See* Latin Focus Consensus Forcast, *available at*: http://www.latin-focus.com/latinfocus/countries (showing statistics indicating that GDP failed to grow in Brazil between 1995 and 2002; Argentina's economy was stagnant during 2001 and, during the first quarter of 2002, its annual economic growth rate declined 16%; and between the middle of 1998 and the middle of 1999, Venezuela went from experiencing moderately positive to moderately negative economic growth, and by 2003 was experiencing sharp negative growth before its economy recovered).

168. Francisco Panizza, *Unarmed Utopia Revisited: The Resurgence of Left-of-Centre Politics in Latin America*, 53 POL. STUD. 716, 727 (2005); Jorge Castañeda, *Latin America's Left Turn*, 85:3 FOREIGN AFF. 28 (2006).

169. Consider that Hugo Chavez was elected President of Venezuela shortly after the country went from experiencing moderately positive to moderately negative economic growth; that Luiz Inàcio Lula da Silva was elected President of Brazil after a 7 year period during which, after rising and then falling, Brazil's GDP remained constant; and that Argentina elected Nestor Kirchner after it experienced economic collapse.

170. Castañeda, *supra* note 168; Chris Kraul, *Ecuador's New President Targets Foreign Debt Relief*, L.A, TIMES, Jan. 16, 2007, at A6.

171. *See generally* Castañeda, *supra* note 168.

172. Panizza, *supra* note 168, at 727.

173. While this article is concerned with economic and social rights in Venezuela since Chavez came to power, rather than with political rights, it is important to note Venezuela has been criticized by states and international organizations, including the Organization of American States, for depriving people of their liberty, condoning extra-judicial killings, and generally failing to protect political rights. *See* IACHR, Press Release: IACHR Reports on the Situation of Human Rights at the Conclusion of Its Session, No. 35/05, Oct. 28, 2005.

174. *See* Christian Parenti, *Hugo Chavez and Petro Populism*, NATION, Apr. 11, 2005, at 17 (stating Venezuela has spent billions on social programs that have taught 1.3 million people to read, provided medical care to millions, and improved infrastructure); Castañeda, *supra* note 168.

175. Simon Romero, *Chavez Begins New Term Vowing Socialism*, N.Y. TIMES, Jan. 11, 2007, at

Latin America; Jorge Castañeda, the Foreign Minister of Mexico under President Vicente Fox and current professor at New York University, has called Chavez a populist leader who "does very little for the poor of his own country"[176] and who pursues "big-time spending, authoritarian governance and militant anti-Americanism."[177] However, if Chavez moderates his stance and redirects his focus on protecting social and economic rights towards development of a CSR code, a change which seems more likely since Venezuelans rejected a referendum that would have given Chavez greater constitutional powers, he could wield tremendous influence in the region. Such pragmatism would advance efforts toward placing social responsibilities upon corporations.

Luiz Inàcio Lula da Silva was elected President of Brazil in 2002, the first left-wing Brazilian president since 1970.[178] Lula has developed socialist policies "without rejecting the precepts of capitalism."[179] Local-level councils provide input that shape his party's national agenda, and his government supports the Landless Rural Worker's Movement, the world's largest movement of rural poor and a strong advocate of agrarian reform. Lula also has weakened ties with the United States and strengthened ties with other developing countries such as China, India, and South Africa, hoping to counter U.S. influence in the region.[180] Thus, although Brazil follows capitalist ideology, its government also is concerned with protecting its citizens' social rights and projecting its socialist perspective into the international community.[181] Because a CSR code would help Brazil's government achieve these goals, Lula's rise strengthens the likelihood that the international community will develop a code of corporate social responsibility.

Nestor Kirchner was elected President of Argentina in 2002, following the former president's resignation in 2001 and the country's economic collapse.[182] Kirchner initially challenged the IMF, stating that foreign investors would receive only a small portion of the debt Argentina owed them because he wanted to conserve funds for social programs.[183] Kirchner later changed his position, announcing Argentina would pay its debt early, and, in January 2006, made the

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A16.

176. *See* Castañeda, *supra* note 168.

177. Jorge G. Castañeda, *Good Neighbor Policy*, N.Y. TIMES, May 4, 2006, at A31.

178. Panizza, *supra* note 168, at 716.

179. *The Region's Leftward Shift: Identifying, Denying, and Interpreting Divisions*, LATIN AM. WKLY REP., Jan. 31, 2006.

180. Kenneth Rapoza, *Brazil Moves to Form "Bloc" Against U.S.: Seeks "South-South" Cooperation*, WASHINGTON TIMES, Nov. 4, 2003, at A15.

181. *See* Simon Romero, *Brazil's Objections Slow Chavez's Plans for Regional Bank*, N.Y. TIMES, July 22, 2007, at A12 (noting that Brazil has sought to diminish the clout of a Bank of the South, and calling Lula a "longtime socialist who embraced market friendly policies once in power . . . "); Hall, *supra* note 166 (discussing how Brazil's enthusiasm for social safety nets has followed the failure of neoliberal policies and the accompanying destruction of social infrastructure).

182. Panizza, *supra* note 168, at 717.

183. Colin McMahon, *Tension Builds as Argentina Tries to Renegotiate its Defaulted Debt*, CHI. TRIB., Sept. 1, 2004; Todd Benson, *Argentina Starting Drive to Emerge from Fault*, N.Y. TIMES, Jan. 12, 2005, at C4.

country's last payment.[184] Argentina's debt payment showed its willingness to work within the existing international economic system and pleased foreign investors. However, Argentina is wary of neoliberal dictates, opposes a free-trade agreement, and in some instances has aligned closely with Venezuela.[185] Thus, Argentina accepts that foreign investment is necessary for long-term economic growth, though it also questions and challenges the neoliberal agenda. The new President of Argentina, Cristina Kirchner, has continued many of the same policies that her husband developed. Because a CSR code could protect Argentines from the activities of MNCs and soften neoliberal policies, the election of Kirchner's government strengthens the likelihood that Argentina will endorse and the international community will develop a CSR code.

Bolivia recently elected Evo Morales as President. During his campaign, Morales promised to depart from twenty years of neoliberal reforms that failed to pull Bolivia from poverty, and to turn towards socialist-oriented policies.[186] Since taking office, Morales has nationalized Bolivia's oil and gas industry, ordering troops to occupy foreign-run fields.[187] Morales has indicated he may nationalize other sectors as well, such as the mining and forest industries.[188] An Amyara Indian and past leader of the coca union, Morales also has championed the rights of the poor and of indigenous people. He has declared that coca, widely used in Bolivia as a mild medicinal herb, should be treated as a legitimate product, rather than as an illicit drug. He also has fought multinationals' exploitation of Bolivia's natural resources.[189] Bolivia's ratification of a CSR code that governs the conduct of MNCs operating within its borders would further its socialist objectives while providing it with foreign investment. Accordingly, the election of Morales furthers the likelihood that developed states, developing states, and multinationals will adopt a CSR code.

Other countries in Central and South America also have elected SO leaders in recent years. Ecuador's recently elected president, Rafael Correa, has challenged foreign corporate interests and supported socialist-oriented policies.[190] For

184. Larry Rohter, *As Argentina's Debt Dwindles, President's Power Grows Steadily*, N.Y. TIMES, Jan. 3, 2006, at A1; Colon McMahon, *For Argentina, Debt Cut is Payback Time*, CHI. TRIB., Jan. 13, 2006, at C5.

185. Moises Naim, *The Lost Continent*, 157 FOREIGN POL'Y, 40 (2006).

186. Daphne Eviatar, *Liberating Pachamama: Corporate Greed, Bolivia, and Peasant Resistance*, 38:2 DISSENT 22, 25 (2006); MARK WEISBRODT & LUIS SANDOVAL, BOLIVIA'S CHALLENGES 6 (2006) (stating that Bolivia is South America's poorest country, with an average per capita income of $2,800 as compared to an average of $8,200 in all of Latin America, with 64% of Bolivians living below the poverty line).

187. Hector E. Schamis, *Populism, Socialism, and Democratic Institutions*, 17:4 J. OF DEMOCRACY 20, 32 (2006).

188. Tyler Bridges, *Farmers' Fears Highlight Growing Rift with Morales*, MIAMI HERALD, June 14, 2006 (noting that foreign mining companies, such as Apex Silver, Coeur d'Alne and Newmont, together have invested $750 million in Bolivia, at least part of which they stand to lose upon nationalization.

189. Eviatar, *supra* note 186, at 26-27.

190. Chris Kraul, *Ecuador's New President Targets Foreign Debt Relief*, L.A. TIMES, Jan. 16, 2007, at A6.

example, a recent election for Ecuador's constituent assembly gave Correa "a clear mandate to write a new constitution reflecting '21st century socialism,"[191] and Correa opposes a free trade agreement with the United States.[192] In November, 2006, Nicaragua elected Daniel Ortega, an SO politician, leader of the communist Sandinista National Liberation Front during the 1980's, and former president of the county, as its new President.[193] Peru, Chile, and Uruguay also have elected centre-left leaders over the past few years.[194] The election of these governments should further efforts to develop a CSR code.

Leaders critical of neoliberal prescriptions and supportive of SO policies have come to power in Latin America over the past decade. To varying degrees, they have pursued policies that benefit lower classes and workers, have protected their domestic industries from the influence of foreign MNCs and, in some cases, have nationalized major sectors of their economies. Their efforts to combat the harms that have accompanied the growth of FDI and spread of MNCs in Latin America are consistent with the goals of a CSR code. Accordingly, the rise of SO governments in Latin America, when viewed in light of the trend towards placing greater responsibilities upon corporations, and in light of the adoption of non-binding CSR codes by IGOS and MNCs, should advance development of a code of corporate social responsibility.

IV. CORPORATE ABUSES OF ECONOMIC AND SOCIAL RIGHTS, THE FAILURE OF THE RULE OF LAW, AND NON-BINDING CSR MEASURES AS MEANS OF PROTECTING ECONOMIC AND SOCIAL RIGHTS

Multinational corporations have been accused of committing human rights abuses on various occasions and in various countries over the past decade. The international community has drafted several non-binding corporate human rights obligations to address these abuses. Likewise, MNCs voluntarily have drafted and adopted non-binding codes of social conduct. These measures demonstrate that states and corporations worldwide understand that the absence of an enforceable regulatory framework for MNCs has created problems. Even more importantly, these measures show states are willing to place social responsibilities on MNCs, and MNCs are willing to accept such obligations.

A. Concerns Over Rights Abuses and the Failure of the Rule of Law

Multinational corporations have been accused of violating civil and political rights; economic, social, and cultural rights; and environmental rights. For example, it was alleged that U.S. parent company Unocal and its French subsidiary

191. *Ecuador: Correa's Victory*, THE ECONOMIST, Oct. 6, 2007.

192. *Correa Plans Many Changes: Ecuador is Not Anti-American, New Leader Says*, S. FLORIDA SUN SENTINEL, Oct. 3, 2007 at 25A.

193. Adam Thompson, *Long Road Back to Power*, FIN. TIMES Jan. 8, 2007, at 32.

194. *Latin America, 2006*, WASHINGTON TIMES, Dec. 30, 2006, at A12 (noting that both Michelle Bachelet, who recently was elected President of Chile, and Alan Garcia, who was elected as President of Peru, have pursued free-trade agreements with the United States); Castaneda, *supra* note 168 (noting that Tabare Vazquez, who was elected President of Uruguay in 2004, has both denounced neoliberalism and explored the possibility of a free-trade agreement with the United States).

knew the Burmese government was using slave labor, raping women, confiscating property, and uprooting communities in order to assist Unocal's construction of a gas pipeline.[195] Local forces in Nigeria hired by Shell carried out large-scale, extra-judicial killings and destroyed villages in order to secure Shell's investment in the country.[196] In India, Dabhol Power Corporation (majority owned by Enron) hired police forces who arbitrarily detained non-violent protestors.[197] A subcontractor of the Gap in El Salvador employed workers in sweatshop conditions.[198] British Petroleum admitted to hiring Columbia's military to protect its oil operations in the country, with disregard for whether the military also would protect basic human rights.[199] Children worldwide are engaged in labor.[200] Most recently, Blackwater USA has been accused of opening fire without provocation while providing private security services in Iraq, killing 17 citizens.[201] Other violations include exposing workers to sulfur dioxide in Peru and dumping waste into the waters of Ecuador and Indonesia.[202] These are not isolated instances of misconduct, but rather samples drawn from a larger pool of human rights violations. However, at the present only states, and in a few instances individuals, are treated as having human rights obligations.[203]

B. Intergovernmental Organizations' Non-binding Corporate Social Responsibility Measures

Concern over human rights abuses associated with corporate activities has prompted states to develop non-binding CSR codes. The stakeholder governance style of European companies, under which corporations consider relationships with employees, consumers, and the environment when making decisions, has made Europe a natural leader in this process.[204] In 1999, the European Parliament adopted a "Code of conduct for European enterprises in developing countries" (the Code).[205] While the Code does not establish specific, binding corporate social responsibilities, it does erect the foundation for enforceable regulations. The Code

195. Hall, *supra* note 16, at 416-17.

196. Cassel, *supra* note 16, at 1965-68.

197. Glen Kelley, *Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations*, 39 COLUM. J. TRANSNAT'L L. 483, 513-14 (2000).

198. Cassel, *supra* note 16, at 1968-69.

199. Stephens, *supra* note 1, at 52.

200. James J. Silk & Meron Makonnen, *Economic Exploitation of Children: A Role for International Human Rights Law?*, ST. LOUIS U. PUBLIC L. REV. 359, 359 (2003).

201. John M. Broder, *State Dept. Plans Tighter Control of Security Firm*, N.Y. TIMES, Oct. 6, 2007, at A1.

202. Phillip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Concepts and Procedural Problems*, 50 AM. J. COMP. L. 493, 514-16 (2002); Stephens, *supra* note 1, at 53.

203. Ratner, *supra* note 19, at 462-65.

204. Cynthia A. Williams & John M. Conley, *An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct*, 38 CORNELL INT'L L. J. 493, 498 (2005). Europe's stakeholder governance orientation is in contrast to the shareholder orientation U.S. companies follow, which centers on maximizing shareholder wealth.

205. Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct, 1999 O.J. (C 104) 180 [herereinafter EU Code].

recommends the EU endorse "existing minimum applicable international standards" the ILO, UN, and OECD have set for regulating the social impacts of corporate activities, and calls on the EU to work with these organizations "to ensure more powerful and effective monitoring and enforcement mechanisms."[206] Provisions also stress that an EU CSR code should protect the rights of indigenous peoples and create social labels for products.[207] A paper the Commission of European Communities issued in 2001 (the Green Paper) supplements the Code, declaring that "[c]orporate social responsibility should... not... substitute for social rights or environmental standards, including the development of new... legislation."[208]

The United States also has adopted non-binding measures that place greater social responsibilities on corporations. It recently signed the Voluntary Principles on Security and Human Rights (the Voluntary Principles) with the United Kingdom. The Voluntary Principles establish high CSR standards for businesses in the extractive and energy sectors and tout the constructive role businesses can play in protecting social rights.[209] The Voluntary Principles ask businesses in the extractive and energy sectors to establish procedures for assessing the risk that the corporation, its agents, or its host country might commit a human rights violation; to ensure that public security forces the government provides for the corporation's benefit do not commit human rights violations; and to "record and report any credible allegations of human rights abuses by public security in their areas of operation to appropriate host government authorities."[210]

More recently, in response to allegations that Blackwater USA opened fire without provocation while providing private security services in Iraq, killing 17 citizens, the U.S. State Department announced new policies that would ensure tighter control of the company. According to these measures, State Department monitors must accompany all Blackwater convoys in and around Baghdad, all Blackwater vehicles must be equipped with State Department video cameras, and recordings of all radio transmissions between Blackwater convoys and military and civilian agencies supervising those convoys in Iraq must be saved.[211]

Intergovernmental organizations also have begun to develop non-binding CSR codes. Every OECD country plus nine non-member countries have signed the OECD Guidelines for Multinational Corporations (the Guidelines). The Guidelines encourage corporations to voluntarily adopt certain standards. They suggest that "enterprises should... respect the human rights of those affected by their activities consistent with the host government's international obligations and

206. *Id.* at arts. 12, 29. Relevant standards cover human rights, labor, and the environment.

207. *Id.* at arts. 7, 12, 14.

208. *Green Paper: Promoting a European Framework for Corporate Social Responsibility*, at 22, COM (201) 366 final [hereinafter *Green Paper*].

209. U.S. Department of State Fact Sheet, Voluntary Principles on Security and Human Rights (Feb. 20, 2001), *available at* http://www.state.gov/g/drl/rls/2931.htm [hereinafter Voluntary Principles].

210. *Id.*

211. Broder, *supra* note 201.

commitments."[212] Enterprises also should "[r]espect" employees' freedom to join trade unions, "[c]ontribute" to the "abolition of child labor", and end workplace discrimination.[213] Other terms enounce high environmental, corruption, and consumer protection standards that corporations should follow.[214]

In two separate documents, the Global Compact (the Compact) and the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms), the United Nations also has announced CSR guidelines. The Compact "asks companies to embrace, support and enact within their sphere of influence" ten core human rights, labor, environmental, and anti-corruption values that are derived from international treaties.[215] While the Compact states lofty goals, its vagueness and lack of enforceability undermine its effectiveness.[216] These weaknesses, common to CSR codes that IGOs and corporations develop, have strengthened calls for "holding companies accountable through legal rules for the human rights and environmental impact of their policies," an idea echoed in the UN Norms.[217] The UN Norms assert that, although "[s]tates have the primary responsibility... to protect human rights, transnational corporations and other business entities, as organs of society" under the Universal Declaration of Human Rights, must also secure human rights "[w]ithin their respective spheres of activity and influence...."[218] Using legally binding language, the Norms declare that corporations "shall" ensure non-discriminatory treatment, security of persons, workers' rights, respect for human rights and national sovereignty, and environmental protections.[219] However, states have not yet adopted the Norms, and they are not in force.[220]

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212. OECD Guidelines for Multinational Corporation: Revision 2000, art. 2(2), June 27, 2000, 40 I.L.M. 237, 240 *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf [hereinafter OECD Guidelines].

213. *Id.* at art. 4.

214. *Id.* at arts. 5-7.

215. UNITED NATIONS, GLOBAL COMPACT, TEN PRINCIPLES, *available at* http://www.unglobalcompact.org (Feb. 3, 2007) [hereinafter Global Compact]. The Ten Principles are pulled from the Universal Declaration of Human Rights, The ILO's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the UN Convention Against Corruption.

216. *Id.*

217. United Nations High Commissioner for Human Rights Mary Robinson, Address at University of Tubingen Second Global Ethic Lecture (Jan. 22, 2002), *available at* http://www.weltethos.org/st_9_xx/9_144.htm.

218. *See,* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Promotion and Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter *UN Norms*].

219. *Id.* at 2-14.

220. *See* Office High Comm'r Human Rights, *Human Rights Resolution 2005/69*, U.N. Doc. E/CN.4/RES/2005/69 (Apr. 20, 2005) (requesting "the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises, for an initial period of two years [t]o identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights); Larry Cata Backer, *Multinational Corporations, Transnational Law: The*

Finally, while the ILO always has protected worker's rights,[221] in recent years it has imposed more corporate social responsibilities directly on employers. For example, the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy establishes a comprehensive framework of employment promotion, training, wage, workplace safety and security, and collective bargaining standards for MNCs in developing countries to follow, with the goal of "encourag[ing] the positive contributions which multinational enterprises can make to economic and social progress...."[222] More recently adopted, the ILO Declaration on Fundamental Principles and Rights at Work "[d]eclares that all Members... have an obligation... to respect, to promote and to realize, in good faith the principles concerning the fundamental rights of ILO Conventions.[223] These rights include "freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation."[224]

The 1995 Mines Convention requires employers to "eliminate risks" and to "ensure that the mine... provide[s] conditions for safe operation and a healthy working environment.[225] Recognizing that undeveloped laws in host countries may not protect employees, the Mines Convention also provides that, "where appropriate," employers must supplement national standards with "technical standards, guidelines or codes of practice."[226] Likewise, under the 2001 Agriculture Convention, employers must "ensure the safety and health of workers in every aspect related to work."

C. Voluntary Corporate Codes of Conduct

Finally, many corporations have drafted and implemented voluntary, self-imposed codes of conduct. The Sullivan Principles, one of the first CSR codes

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United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law, 37 COLUM. HUMAN RIGHTS L. REV. 287, 298 (2006).

221. *See, e.g.*, Constitution of the International Labor Organization, June 28, 1919, 49 Stat. 2712, 15 U.N.T.S. 35; Convention Concerning Freedom of Association and Protection of the Right to Organise, July 9, 1948, 68 U.N.T.S. 17; Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, July 1, 1949, 96 U.N.T.S. 257.

222. International Labor Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labor Office, 204th Sess., Nov. 1977, as revised by the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, ILO, 279th Sess., Nov. 17, 2000 [hereinafter Tripartite Declaration], *available at* http://www.oit.org/public/english/employment/multi/download/english.pdf.

223. International Labor Organization, Declaration on Fundamental Principles and Rights at Work and Its Follow-Up, adopted by the International Labor Conference, 86th Sess., 18 June 1998, art. 2 [hereinafter ILO Declaration on Rights at Work], *available* at http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT.

224. *Id.*

225. Convention Concerning Safety and Health in Mines, June 22, 1995, arts. 6-7, S. TREATY DOC. NO. 106-8 (1999), 2029 U.N.T.S. 209, 212 [hereinafter Mines Convention].

226. *Id.* at 211.

MNCs voluntarily adopted, was developed to help promote ethical corporate behavior in South Africa during apartheid.[227] Since formation of the Sullivan Principles, many MNCs have written and passed their own CSR codes.[228] These codes vary greatly. While some merely describe good practices to which the corporation should aspire, others state specific human rights principles.

Royal Dutch Shell's CSR code states broad principles, emphasizing the importance of "be[ing] good neighbors" to local communities, "respect[ing] the human rights of [its] employees", and "conduct[ing] business as responsible corporate members of society."[229] Similarly, YUM! Brands Inc, owner of Pizza Hut, Taco Bell, and Kentucky Fried Chicken, has a loosely worded Supplier Code of Conduct stating that suppliers "are expected to ensure that their workers have safe and healthy working conditions" and "should not use workers under the legal age for employment for the type of work being performed."[230] Conversely, The Gap's Vendor Code of Conduct contains eight articles that set specific standards for its vendors and factories. Its code outlaws discrimination based on "race, color, gender, nationality, religion, age, maternity, or marital status" in a manner that largely comports with articles 2 and 23 of the Universal Declaration of Human Rights, and prohibits "involuntary labor of any kind" in a manner that largely comports with article 8 of the International Covenant on Civil and Political Rights.[231] Although less detailed than The Gap's Code of Vendor Conduct, Adidas' Workplace Standards specifically state that "[b]usiness partners must not employ children who are less than 15 years old" and that "[w]ages must equal or exceed the minimum wage required by law or the prevailing industry wage, whichever is higher."[232]

D. Conclusion

Attention on human rights abuses associated with the activities of multinational corporations has increased over the past decade. Corporations have been censured for participation in and failure to prevent extra-judicial killings, environmental degradation, labor rights violations, and other human rights abuses.

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227. Henry J. Richardson III, *Reverend Leon Sullivan's Race, Principles, and International Law: A Comment*, 15 TEMPLE INT'L AND COMP. L.J. 55, 57-61 (describing how the Sullivan Principles required corporations to give their black workers in South Africa "the same rights, treatment, advancement, and employment benefits as would be basically required in the United States under its constitutional equal protection standards," and required corporations to undertake infrastructure projects for the benefit of their workers).

228. Natasha Rossell Jaffe & Jordan D. Weiss, *The Self-Regulating Corporation: How Corporate Codes Can Save Our Children*, 11 FORDHAM J. CORP. & FIN. L. 893, 909-10 (2006).

229. Shell Code of Conduct, *available at* http://www.shell.com/static/envirosoc-en/downloads/making_it_happen/our_commitments_and_standards/code_of_conduct/english.pdf.

230. YUM! Brands, Inc., Supplier Code of Conduct, *available at* http://www.pizzahut.com/SupplierCode.aspx.

231. International Covenant on Civil and Political Rights, Dec. 19. 1966, art. 8(3), 999 U.N.T.S. 171; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Resolutions, Part I, U.N. Doc. A/810 (1948); Gap Inc. Code of Vendor Conduct, Arts. III, IV, *available at* http://www.gapinc.com/public/documents/code_vendor_conduct.pdf.

232. Adidas Group, Workplace Standards, *available at* http://www.adidas-group.com/en/sustainability/Overview/our_standards/standards_of_engagement.asp.

In response, IGOs and MNCs have accepted that corporations should be held accountable to citizens of developing countries for their actions and have adopted non-binding CSR measures. The process of developing and analyzing these measures has furthered dialogue on the form a CSR code should take. When viewed in light of the trend towards placing greater responsibilities on corporations, beginning with the FCPA and extending to SOX, and in light of the rise of SO governments in Latin America, the adoption of CSR codes by intergovernmental organizations and MNCs suggests the international community is moving towards developing a binding code of corporate social responsibility.

V. THE FINAL FRONTIER: A CODE OF CORPORATE SOCIAL RESPONSIBILITY

Although the international community is moving toward creating a binding CSR code, designing such a code will be difficult. Various hurdles complicate and block its development. These hurdles include MNCs' ambiguous responsibilities under international law,[233] disagreement over the degree to which corporations may pursue goals other than maximizing profit,[234] corporate resistance to costly CSR regulations,[235] developed states' reluctance to impose CSR regulations on their multinationals,[236] many developing states' resistance to measures that might hurt their competitiveness as a destination for FDI vis a vis other states,[237] and still other obstacles as well. As countries, IGOs, and scholars debate whether a binding CSR code is both palatable and possible, and disagree over the structure such a code should take, they must balance the competing interests that complicate development a CSR code.

Below, I propose a framework for an enforceable CSR code. This framework does not analyze and resolve every problem countries, corporations, and civil society organizations will encounter as they construct a binding CSR code. However, this framework does present a novel, potentially useful structure for developing and implementing an enforceable code of corporate social responsibility.

A. Weaknesses of Existing Corporate Social Responsibility Measures

The social responsibility measures countries and corporations have adopted in recent years are praiseworthy. They recognize that corporations not only have a responsibility to maximize profits, but also to protect their workers, communities, and surrounding environments. Nonetheless, various weaknesses limit the effectiveness of existing CSR measures.

The voluntary guidelines that states and IGOs have enacted are unenforceable.[238] Countries and corporations that sign these measures do not

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233. *See* Ratner, *supra* note 19, at 511.

234. *See* Backer, *supra* note 220, at 298-99.

235. Sorcha MacLeod, *Corporate Social Responsibility Within the European Union Framework*, 23 WIS. INT'L L.J. 541, 551-52 (2005).

236. Backer, *supra* note 220, at 381-83.

237. Guzman, *supra* note 18, at 671-74.

238. *See* EU Code, *supra* note 205; *Green Paper*, *supra* note 208; Voluntary Principles, *supra* note 209; OECD Guidelines, *supra* note 212; Global Compact, *supra* note 215; *U.N. Norms*, supra note 218.

accept binding obligations. Thus, countries and corporations can sign to curry political capital, and then choose the degree to which they will abide by their gratuitous promises. Furthermore, these codes are universal, applying identical standards to all countries regardless of each country's particular culture, needs, and resources.[239] This approach eschews reality in favor of utopian, largely western measures that corporations in many states cannot fulfill.

For example, it is naive to believe that foreign subsidiaries of U.S. firms operating in Saudi Arabia could comply with western employment discrimination standards, or that a CSR code could eradicate child labor in Africa and Asia. If employment discrimination were outlawed universally and discrimination against women in Saudi Arabia occurred, the code's enforcement body would face two unappealing choices: it could prosecute the transgressing MNC, offending Saudi sovereignty and values, or it could exculpate the MNC, undermining the enforcement body's authority and legitimacy.[240] Furthermore, universal compliance could cause more harm than good. "In the poorest nations an abrupt halt to child labor is likely to cause children to suffer acute poverty and hunger," and may push children into black market labor and prostitution.[241] Placing stringent, western environmental standards on developing countries, standards many developed states have begun to follow only during the last ten years, would protect the environment while retarding economic growth.[242]

Corporations' CSR codes pose even greater enforcement difficulties. These guidelines not only are self-drafted and self-adopted, but also self-enforced, leaving corporations to implement, monitor, and enforce them in a perverse concentration of power.[243] Moreover, voluntary corporate codes apply only to the small percentage of MNCs that create them, offer a moral platform for egregious rights abuses,[244] and either may not reach foreign subsidiaries or only reach foreign subsidiaries.[245]

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239. *See* EU Code, *supra* note 205; OECD Guidelines, *supra* note 212; *U.N. Norms*, supra note 218.

240. Consider that the U.N. and international community have failed to prevent mass killings in recent years in Bosnia, Rwanda, Somalia, Iraq, Lebanon, and Darfur. *See* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 56 (2d ed., 2001).

241. Kaushik Basu, *Compacts, Conventions, and Codes: Initiatives for Higher International Labor Standards*, 34 CORNELL INT'L L. J. 487, 491 (2001).

242. Tracy M. Schmidt, *Transnational Corporate Responsibility for International Environmental and Human Rights Violations: Will the United Nations' "Norms" Provide the Required Means?*, 36 CAL. W. INT'L L. J. 217, 220-21 (2005).

243. Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389, 401 (2005).

244. Richardson, *supra* note 227, at 58, 62.

245. Murphy, *supra* note 243, at 401; see *e.g.* Gap Inc. Code of Vendor Conduct, *supra* note 231; Adidas Group, Workplace Standards, *supra* note 232; The Coca Cola Company, Supplier Guiding Principles, *available* at http://www.thecoca-colacompany.com/citizenship/supplier_guiding_principles.html.

B. Proposed Framework for a Creating a Binding Code of Corporate Social Responsibility

Analysis of the problems with existing CSR measures reveals that, while a CSR code must be legally binding to regulate corporations effectively, a code also must remain flexible to prevent self-implosion. Below, I propose a two-level framework, an implementation process, and an enforcement mechanism that can be used to construct a CSR code that is binding, pliant, and effective at holding MNCs legally accountable for the social impacts of their activities.

1. Level One: Non-Binding, Universal Human Rights Standards

The first level of a CSR code should state baseline, non-binding human rights standards. These standards should be phrased as aspirations that MNCs should strive to follow and states should promote. Level one standards could be modeled after the Global Compact, though should include more details than the Compact's ten general principles.[246] Level one should avoid the specific terms and binding language the UN Norms employ.[247] Provisions should define common political and bodily (e.g. slavery, rape, extrajudicial killings), labor (e.g. wages, child labor, occupational safety), social (e.g. indigenous people) and environmental (e.g. water and air pollution, damming) human rights standards. Articulating baseline standards will further dialogue and agreement on MNCs' human rights duties and provide structure for developing state-tailored, enforceable responsibilities in the second level of the proposed framework.[248]

2. Level Two: Binding, State Specific Codes

Level two should contain the code's substantive, binding terms. Because OECD countries produce a large majority of the world's multinational corporations and FDI, I suggest matching one representative from an OECD country with one representative from each non-OECD, ratifying host state (host state).[249] Together, through input from MNCs and civil society, these teams of two should adopt legally binding CSR duties based on level one's standards. These duties should regulate the activities of MNCs operating in each host state and should be tailored to each host state's unique needs, culture, and resources. This level must use enforceable, binding language ("MNCs shall..."), clearly informing states and MNCs that noncompliance will result in penalties.

By tailoring binding measures to each country's dynamics, the code would account for different conceptions of an adequate standard of living, discrimination, and bribery. If child labor is needed in a given country to help feed and shelter families, that country's team of two may permit it under certain conditions that

246. Global Compact, *supra* note 215.

247. *U.N. Norms*, supra note 218.

248. Bennett Freeman et al., *A New Approach To Corporate Responsibility: The Voluntary Principles on Security and Human Rights*, 24 HASTINGS INT'L. COMP. L. REV. 423, 433-35 (2001).

249. *Outward FDI Flows (1970-2005)*, *in* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2005: TRANSNATIONAL CORPORATIONS AND THE INTERNATIONALIZATION OF R&D (2005) (reporting that, in 2005, 83% of all FDI came from developed countries).

perhaps demand parental permission, prohibit overtime, and require MNCs to hire independent managers who monitor the treatment of children.[250] Countries plagued by corruption can enact stringent bribery laws while permitting generic occupational safety standards because their governments already address that issue. Thus, industry specific standards are not needed. Instead, country specific standards would provide flexibility while, at the same time, mandatory language would make adherence to these standards legally binding.

Some may contend flexibility will provide a platform for countries to set weak standards. However, a realistic approach tailored to each state's unique history, resources, cultures, and needs is vital; compliance with modest but realizable standards is better than disregard for unattainable ideals.[251] Moreover, the code can prevent the watering down of human rights duties by pairing together OECD and host state representatives whose countries have few investment connections, and thus little interest in collusion. Every few years the teams of two should evaluate the customized duties. If tighter child labor laws are needed, the government can enact such measures; if the cost of living has increased, the teams can raise minimum wages.

Others may contend host states competing for FDI would not ratify a code that regulates MNCs more closely and, in turn, hurts their competitiveness vis a vis other countries.[252] However, a code can encourage ratification through an investment freeze that prohibits ratifying states from making new investments in non-ratifying countries. An investment freeze would goad states that have not ratified the treaty to ratify it through fear of stagnant foreign investment. As more states ratify, non-ratifying states would become increasingly isolated. Faced with either isolation or integration, many states would choose integration and ratify the code knowing their sovereignty, cultures, economy, and needs would not be jeopardized. Still, the details of an investment freeze would need refinement to prevent ratifying states from losing investment opportunities. Perhaps the freeze should be implemented after fifty states have ratified the code, or limited to certain sectors of each non-ratifying state's economy.

3. The Code Committee

An executive body should oversee the code's procedural niceties, implementation, monitoring, and enforcement. I suggest creating a code committee to handle these tasks. The committee could consist of 11 members representing the four major stakeholder groups – corporations, developed countries, developing countries, and civil society – and could be elected by ratifying states every few years, with one vote per state. Four members should hail from OECD states, three from developing states, and two each from MNCs and

250. *See* Basu, *supra* note 241, at 491 (noting that "[p]arents do not typically send their children to work out of sloth but rather out of desperation.").

251. *See Id.* at 496 (emphasizing the need for democratization of international organizations in order to account for the interests of developing states).

252. Guzman, *supra* note 18, at 671-74.

NGOs. This arrangement would balance power within the committee and prevent an individual stakeholder group from assuming control.

The committee could be charged with various tasks. It could approve all OECD and host state "teams of two" in order to combat collusion between OECD countries and host states and ensure representatives are disinterested. The committee also could field complaints about countries' level two codes, such as allegations that a code is watered down or ignored, and either resolve the issue amicably or refer it to a tribunal. Amendments to procedural matters, such as the process for selecting country representatives, committee members, and tribunal members, and amendments to substantive matters, such as increases in level one's baseline standards, could be approved by a majority vote of the committee. As the code is drafted and implemented, additional responsibilities would be conferred upon the committee.

4. Enforcement

States' level two human rights obligations must be legally binding and enforceable. Unenforceable obligations lack capacity to punish violations and foment change; perhaps galvanizing MNCs around shared norms, but failing to ensure that practice follows speech.[253] Empowering a tribunal with enforcement authority will deter violations, promote responsible corporate activity, and compensate the injured. Moreover, consistent and fair enforcement will increase the code's legitimacy, preventing the emasculation and loss of authority that plague many international treaties.

Any entity, including individuals, NGOs, businesses, and states, should be allowed to bring a complaint alleging a corporation violated its level two corporate social responsibilities. The code should require complaints to be brought initially before the representative of the host state where the supposed violation occurred and that representative's OECD counterpart. Because MNCs often do not intend to violate human rights and, especially when violations are committed by contractors or licensees, MNCs may not be aware that violations are occurring, the team of two should discuss the situation with the MNC and attempt to resolve it amicably.[254] If the MNC accepts responsibility and works with the team of two in creating and implementing a solution, referral to a tribunal would not be necessary.[255] This initial, non-confrontational process is fashioned after the OECD's national contact points system.[256] It would be an efficient, cost-effective, and fair method of settling many complaints, especially baseless claims, minor infractions, and violations corporations are willing to address. The country

253. Elisa Westfield, *Globalization, Governance, and Multinational Corporations: Corporate Codes of Conduct in the 21st Century*, 42 VA. INT'L L.J. 1075, 1078 (2002).

254. *See* Ratner, *supra* note 19, at 518-520 (noting that corporations can have varying levels of knowledge of rights abuses based on how much control parents have over their subsidiaries).

255. *See e.g.*, Voluntary Principles, *supra* note 209 (establishing a voluntary guide that encourages collaboration between the extractive industry and host states).

256. OECD Guidelines, *supra* note 212, at Part 2: Implementation Procedures of the OECD Guidelines for Multinational Corporations, art. I.

representatives should report to the committee every six months on the corporation's compliance with remedial measures.

In some cases, however, human rights violations may be especially egregious, the corporation may deny responsibility, or the team of two may disagree on an appropriate resolution. An informal enforcement process would not be adequate in such instances. Instead, the complaint should be referred to a tribunal that adjudicates alleged code violations. Each ratifying country could nominate one judge who, after receiving the committee's approval, would be available to serve on tribunals. Seven judges could decide each case by majority vote; perhaps two nominated by the host state, two by the home state, two by the complainant, and one by the MNC, to ensure fair representation. All MNCs incorporated as businesses in ratifying states would be subject to the court's jurisdiction, allowing the court to collect money judgments from MNCs and grant injunctive relief.

Beyond these details, the committee would need to fine tune the judicial process and resolve difficult questions. May the committee or a tribunal override the OECD and host state representatives' enforcement decisions, either placing a claim on the tribunal's docket or releasing a case from tribunal back to the representatives? On how many tribunals may a single judge serve? How should tribunal proceedings be drafted? Would appeals be possible? What types of damages would be available? May tribunals enforce creative remedies, such as requiring a MNC to provide education for child laborers? May tribunals issue advisory opinions?

C. Conclusion

Existing CSR codes have weaknesses, such as a lack of enforceability and a universal application, that limit their effectiveness. These weaknesses require a new framework for structuring a CSR code. The dual level approach presented in this section provides such a framework, placing legally binding duties on corporations while tailoring those duties to each country's individual culture, needs, and resources. The code committee and enforcement mechanisms strengthen the proposed framework's ability to regulate the social effects of corporate activities. Admittedly, this framework is not a panacea and leaves many questions unanswered. However, this section's goal is not to propose a final solution for structuring a CSR code. Rather, it is to contribute to the discussion on how to place corporate social responsibilities on multinational corporations.

VI. SUMMARY AND CONCLUSION

Over the past thirty years, as corporations have amassed wealth and power, the United States and the international community slowly have responded by placing greater responsibilities on corporations. First, a pandemic of corporate bribery prompted the United States to pass the Foreign Corrupt Practices Act in 1977, and to expand the act's jurisdiction and substance in 1998, placing various anti-bribery responsibilities on corporations. The international community followed suit, drafting similar measures. Soon after the U.S. and international community developed anti-corruption measures, corporate governance problems in the United States led to passage of the Sarbanes-Oxley Act. Sarbanes-Oxley places new duties on corporations, tightens regulations, and demands even greater

corporate responsibility. The U.K. and the EU also have grown concerned with corporate governance problems, and have adopted measures similar to SOX to solve these problems.

While states worldwide have been placing heightened responsibilities on corporations, governments throughout Latin America have adopted socialist-oriented policies. Their efforts to protect their workers and economies from harms that have accompanied the spread of multinationals in Latin America are consistent with interest in greater corporate social responsibility and a CSR code. At the same time, the international community and multinational corporations have drafted various non-binding measures that are rooted in the FCPA's and SOX's trend towards placing greater responsibilities on corporations, though these measures impose a new type of responsibility on MNCs – social responsibility for employees, communities, the environment, and society.

Although existing CSR measures are commendable, they also are unenforceable. If states, the international community, MNCs, and civil society truly wish to regulate the social problems that have accompanied corporations into developing countries, these stakeholders must work together to overcome weaknesses in existing measures and to develop a binding CSR code. This article offers a dual level framework for constructing such a code that hopefully can contribute to the dialogue on how to ensure that, as corporate power grows, corporate responsibility for workers, communities, and the environment will grow as well.

GLOBAL GOVERNANCE OF FINANCIAL SYSTEMS: THE INTERNATIONAL REGULATION OF SYSTEMIC RISK

Reviewed by B. Salman Banaei [1]

KERN ALEXANDER, RAHUL DHUMALE, & JOHN EATWELL, GLOBAL GOVERNANCE OF FINANCIAL SYSTEMS: THE INTERNATIONAL REGULATION OF SYSTEMIC RISK, (Oxford Univ. Press 2006).

I. INTRODUCTION

Systemic risk may be the "scariest" term in a central banker's vocabulary.[2] What is systemic risk? Consider the returns on a single investment, the actual return on an investment has two components: expected return plus (or minus) an unexpected return or risk return.[3] This risk return may be broken down into two categories: unsystemic and systemic.[4] Unsystemic risk is sometimes called idiosyncratic risk; it is the kind of risk that is specific to an asset.[5] This kind of risk is diversifiable because variance in asset returns tend to be reduced in a portfolio with an increasing number of different assets.[6] In contrast, systemic or market risk is non-diversifiable.[7] An increase in adverse systemic risk affects the returns on *all* assets sensitive to systemic risk in the globalized economy.[8] The term "systemic risk" is used in *Global Governance of Financial Systems* to denote a specific kind of systemic risk "arising from the mispricing of risk in financial markets, which often means that risk is underpriced in relation to its cost and that

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1. D.N.M., École Nationale Supérieure du Pétrole et des Moteurs (2008); M.Sc., Colorado School of Mines (2008); J.D., University of Denver Sturm College of Law (2007); B.A., University of Virginia (2002).

2. Caroline Baum, *Fed Cuts Rates to Address Greater of Two Evils*, BLOOMBERG, Sept. 19, 2007 http://www.bloomberg.com/apps/news?pid=20601039&refer=columnist_baum&sid=aYDiXu0xdpWo.

3. STEPHEN A. ROSS, RANDOLPH W. WESTERFIELD & JEFFREY F. JAFFE, CORPORATE FINANCE 286 (Michele Janicek ed., 6th ed. 2002).

4. *Id.* In other words, where R is the actual rate of return and R' is the expected or risk-free, return and U is the uncertainty or risk premium, then $R = R' + U$. U may be positive or negative. In this note and in the book reviewed herein, adverse systemic risk, or an unexpected lower than expected yield, is used interchangeably with the more general term "systemic risk."

5. In other words, if m is systemic risk and ε is unsystemic risk, then $U = m + \varepsilon$. *Id.* at 288.

6. *Id.* at 262.

7. *Id.* at 263.

8. Sensitivity to systemic risk is quantified in some financial models as β. *Id.* at 271.

the underpricing of risk results in too much of it being created in financial markets."[9]

In *Global Governance of Financial Systems: the International Regulation of Systematic Risk*, authors Kern Alexander (a lawyer and economist), Rahul Dhumale and John Eatwell (economists) (the Authors), argue three principal points: (1) current international and domestic efforts to contain the generation of systemic risk in financial systems are inadequate; (2) this inadequacy increases systemic risk; and (3) an international regulatory response is required.[10] This book note considers the first two arguments and related points in section II and the latter in III.

II. THE FAILURE OF REGULATORS TO PREVENT THE CREATION OF SYSTEMIC RISK

Systemic risk is "created by individual financial institutions [and] the aggregate amount of risk created by all financial institutions in global financial markets."[11] As firms enter into risky investments[12], the aggregate of these risks accumulates, becoming a "negative externality that imposes costs on society at large because [these] firms fail to price into their speculative activities the full costs associated with their risky behavior."[13] Moreover, "adequate regulation [to prevent systemic risk] at the international level has not accompanied" the globalization of financial services and capital flows.[14]

Adequate regulation could have prevented many recent examples of systemic risk causing events that followed from a failure of the current regulatory regime. Two specific examples may be posited as illustrations of the Authors' thesis: one considered by the Authors, the Asian Financial Crisis of the late 1990s and the other a more recent event, the United States Subprime Mortgage Crisis of 2007. Both of these display at least three common themes associated with a failure to regulate the generation of systemic risk in financial systems. First, there was an "underpricing of risk" by lenders and an absence of effective regulation to compel the pricing of risk associated with their lending practices. [15] Second, there were

9. KERN ALEXANDER, RAHUL DHUMALE & JOHN EATWELL, GLOBAL GOVERNANCE OF FINANCIAL SYSTEMS: THE INTERNATIONAL REGULATION OF SYSTEMIC RISK 14 (2006) [hereinafter "GLOBAL GOVERNANCE"].

10. *Id.*

11. *Id.* at 15.

12. *Id.*

13. *Id.* at 24.

14. *Id.* at 3.

15. For information on the Asian Crisis *see* GLOBAL GOVERNANCE, *supra* note 9, at 204 ("Following liberalization, banking systems in many countries have experienced significant problems with large capital inflows in the absence of adequate internal controls and prudential oversight to contain the increased risk of new and expanded activities."). For the U.S. Crisis, *see* Martin Feldstein, *Liquidity Now!*, WALL ST. J., Sept. 12, 2007, at A19, *available at* http://online.wsj.com/article/SB118955944544924579.html ("Credit risk in financial markets had been underpriced for years, with low credit spreads on risky bonds and inexpensive credit insurance derivatives provided by investors seeking to raise their portfolio returns. With such underpricing of risk, hedge funds and private equity firms substantially increased their leverage.").

failures in the banking sector once these risks were realized. [16] Third, in at least some instances, there was some degree of expectation on the part of the lenders that the government would intervene if the debtors defaulted. [17] These shared common characteristics preceded a common result: fear of a broader and international economic downturn, with either "systemic risk"[18] (United States) or "contagion"[19] (Asia) being the associated buzzword.

These domestic financial crises soon become global financial crises given the interconnectedness of financial markets. The globalization of financial systems has "made financial institutions more interdependent and thus more exposed to systemic risk that can arise from bank failures and to volatility in cash flows."[20] This globalization of systemic risk is especially pronounced in some sectors, most importantly, in the banking industry:"[21]

The Authors point out that the Asian financial crisis of the late 1990s would have been avoided if the regulators in the affected nations had planned their liberalization programs with greater foresight.[22] Specifically, regulators should have implemented "prudential policies" that would have established "better risk

16. For information on the Asian Crisis *see* GLOBAL GOVERNANCE, *supra* note 9, at 205 (excessive lending lead to a "buildup of nonperforming loans"). For the U.S. Crisis, *see* Associated Press, *As Foreclosures Surge, Mortgage Lenders Pressured to Offer Borrowers Relief*, INT'L HERALD TRIB., Oct. 23, 2007, http://www.iht.com/articles/ap/2007/10/24/business/NA-FIN-US-Avoiding-Foreclosure.php ("24 percent of the roughly 82,000 loans [issued by Countrywide] were in foreclosure."). *See also* Feldstein, *supra* note 15 ("The subprime mortgage defaults have triggered a widespread flight from risky assets, with a substantial widening of all credit spreads, and a general freezing of credit markets.").

17. For information on the Asian Crisis *see* GLOBAL GOVERNANCE, *supra* note 9, at 205 ("[T]he belief that financial institutions were protected by the government raised moral hazard issues."). For the U.S. Crisis, *see* Nouriel Roubini's Global EconoMonitor, Who is to Blame for the Mortgage Carnage and Coming Financial Disaster? Unregulated Free Market Fundamentalism Zealotry, http://www.rgemonitor.com/blog/roubini/184125 (Mar. 19, 2007) ("The sub-prime and overall mortgage carnage is now likely to lead to a financial crisis whose cleanup and bailout costs will make the S&L bailout bill look like spare change. We are only at the beginning of this fallout but, already, several proposals and bills in Congress have been submitted to help millions of sub-prime homeowners on the verge of bankruptcy and foreclosure."). *See also* Jeanne Sahadi, *Subprime Bailout: Taxpayer Toll*, CNN.COM, Oct. 22, 2007, http://money.cnn.com/2007/10/22/real_estate/bailout_cost/?postversion=2007102212.

18. "[I]n August [of 2007], the negative performance of the financial markets was related mostly to a sharp increase in perceptions about systemic risks." Posting of Greg Ip to Real Time Economics, August vs. October: Credit Crunch vs. Slowdown, http://blogs.wsj.com/economics/2007/10/22 (Oct. 22, 2007, 10:54 EDT).

19. Taimur Baig and Ilan Goldfajn, *Financial Market Contagion in the Asian Crisis*, 42 IMF STAFF PAPERS 167, 181 (1999), *available at* http://www.imf.org/external/Pubs/FT/staffp/1999/06-99/pdf/baig.pdf ("The spreads on dollar-denominated debt [among afflicted Asian economies], representing default risk, display[s] the most striking degree of correlations and evidence of contagion."); *see also* Definitions and Causes of Contagion, http://www1.worldbank.org/economicpolicy/managing%20volatility/contagion/definitions.html (last visited Feb. 10, 2008) ("Contagion is the cross-country transmission of shocks or the general cross-country spillover effects.").

20. GLOBAL GOVERNANCE, *supra* note 9, at 14.

21. *Id.* at 15.

22. *Id.* at 204.

management measures at the microeconomic level."[23] The inexperienced Asian banks lacked such effective policies and the "absence of adequate internal controls" on risk taking further increased risk-taking by these banks, leading over time to a "buildup of nonperforming loans."[24] These banks' risky investments adversely impacted international financial systems and amounted to the externalization of the full social cost of these risky investments onto the broader national and international economy. [25]

Government intervention after a financial crisis in contrast to a prudential regulatory standards intended to prevent a financial crisis, may serve to increase the moral hazard problem.[26] For example, in the 1990s some Asian governments prescribed lending to specific non-performing market sectors.[27] Under the guidance of these government directives, the foreign depositors assumed that the same government institutions would protect the banks' holdings in these market sectors in the event of failure.[28] Not only do such firms undervalue risk, but the moral hazard created by the perception that the government would bail them out in the event of a market failure further increases the underpricing of risk by banks and thus the degree of systemic risk borne by the international economy.[29]

The Authors argue that the current international regulatory framework for "banking supervision" is "especially" flawed.[30] The Basel Committee on Banking Regulation and Supervisory Practices (Basel Committee) "exercises either direct or indirect influence over the development of banking law and regulation for most countries."[31] Its most recent set of proposals, known as "Basel II," the Basel Committee intended to make the "regulatory capital[32] held by banks more sensitive to [] economic risks."[33] But despite Basel II's superficial similarity with the Authors' concern: the lack of an effective international regulatory framework for banking, Basel II is a fundamentally flawed attempt to limit systemic risk. More specifically, the Authors argue that Basel II is flawed on institutional and substantive grounds.

First, the Basel Committee that proposed Basel II has several critical institutional flaws. Chief among these flaws is the Basel Committee's imbalanced decision-making structure. For example, "the Basel Committee is composed of the central bank governors and national bank regulators of the... thirteen richest developed countries."[34] Nations outside of the Committee have no direct influence

23. *Id.* at 205.
24. *Id.* at 204-05.
25. *See id.* at 24.
26. *See id.* at 205.
27. *Id.*
28. *See id.*
29. *See id.*
30. *Id.* at 3.
31. *Id.* at 37.
32. Regulatory capital accounting is distinguished from banks' true economic capital. *See id.* at 224. It is the capital that is weighed in determining a bank's capital adequacy requirements. *See id.*
33. *Id.* at 40.
34. *Id.* at 41.

on the Basel Committee's deliberations.[35] Additionally, the Basel Committee decision-making procedures are secretive and lack transparency.[36] Finally, the Committee also has a record of "uneven implementation and enforcement."[37] The result of this flawed institutional structure has been a slow and half-hearted adoption of the Basel Committee's standards among national regulators and, more importantly, the Committee's regulations ignore the development needs or banking realities in non-developed nations.[38]

Moreover, Basel II's substantive rules do not effectively address the problem of systemic risk. Prior to Basel II, the Basel Committee attempted to control credit risk by implementing minimum capital adequacy standards.[39] These standards were later criticized for being overly rigid.[40] Ostensibly, Basel II aims to address the rigidity problem with more flexible capital adequacy standards.[41] As such, Basel II presents a regulatory framework consisting of "mutually reinforcing pillars" intended to create a flexible, yet effective framework for banking regulation.[42]

First, Basel II provides banks two options for making their regulatory capital determination.[43] The first is a standardized approach paralleling the "one-size-fits-all" pre-Basel II standards,[44] with some modifications.[45] The second capital determination model allows banks to use their own internal ratings.[46] The Authors note that the second internal determination model results in "greater risk sensitivity."[47] However, this model is flawed: first, it is overly flexible on the individual firm level in that there is little guidance on principles individual firms

35. *See id.* at 42.

36. *Id.* at 44.

37. *Id.* at 44.

38. *See id.* at 45.

39. *See id.* at 228.

40. *See id.* at 230. The 1988 Basel Capital Accord (supplanted by Basel II in 2002) required banks "actively engaged in international transactions to hold capital equal to at least 8 percent of risk-weighted assets in an effort to prevent banks from increasing credit risk through greater leverage." *Id.* at 228.

41. *See id.* at 230.

42. *Id.* at 230. *See also* Basel Committee on Banking Supervision,, *The Basel II: International Convergence of Capital Measurement and Capital Standards: a Revised Framework*, ¶ 4, *available at* http://www.bis.org/publ/bcbs107.htm (June 2004) [hereinafter "*Basel II Accord*"].

43. GLOBAL GOVERNANCE, *supra* note 9, at 231.

44. *Id.*

45. *Id.* For example, the pre-Basel II rules provided no credit conversion factor on loan commitments of less than a years duration. Basel II, however, "imposes a 20 percent credit conversion factor." *Id.*

46. *Id.* For example, a bank may estimate each borrower's creditworthiness and then calculate an estimate for future losses. *Id.*

47. *Id.* at 232.

may use to guide their capital determination needs[48]; second, the lack of principled guidance for national regulators may lead to regulatory arbitrage.[49]

The second pillar of Basel II also requires supervisory review of internal bank decisions. These include "efforts by banks to assess their capital adequacy and by supervisors to review such assessments."[50] The purpose of supervisory review is twofold: (1) to "ensure that banks have adequate capital to support all the risks in their business" and (2) "to encourage banks to develop and use better risk management techniques in monitoring and managing their risks."[51] The third pillar of Basel II is market discipline.[52] This pillar complements "the minimum capital requirements (Pillar 1) and the supervisory review process (Pillar 2)."[53] This pillar sets forth disclosure requirements that allow "market participants to assess key pieces of information on the scope of application, capital, risk exposures, risk assessment processes, and hence the capital adequacy of [banking] institution[s]."[54]

The end result of applying the first pillar of determining regulatory capital coupled with the third pillar, market discipline, results in the "homogeneity of financial markets."[55] Banks comporting with the first pillar will construct risk determination models that are based on similar analytical models.[56] Furthermore, the third pillar encourages banks to follow similar disclosure standards and adjust their operations accordingly. The result is similar modeling methodologies that will lead banks to react to the same objective market information in a uniform manner.[57] This model-driven behavior "encourage[s] firms to act as a herd, charging toward the cliff edge together."[58] The resulting homogeneity in financial

48. Specifically, the use of credit rating agencies is criticized by the Authors. *Id.* at 231 ("[T]hese private agents may act either in their own interests or in that of the borrower in hopes of maximizing their own gains by issuing favorable [credit risk] ratings."). The Authors' caution echoes more recent comments made by Former U.S. Federal Reserve Chairman, Alan Greenspan, blasting these same credit agencies for facilitating the global credit crisis that commenced in 2007. Von Norbert Kuls & Claus Tigges, *Die Ratingagenturen Wissen Nicht Was SieTun*, FAZ.NET, Sep. 22, 2007, http://www.faz.net/s/Rub034D6E2A72C942018B05D0420E6C9831/Doc~EF5A672F689134A84842B34B3471D2713~ATpl~Ecommon~Scontent.html („Die Ursache des Problems war, dass die Leute glaubten, die Ratingagenturen verstünden etwas vom ihrem Geschäft. Die wissen aber nicht, was sie tun.") (quoting Alan Greenspan). According to Greenspan, these credit agencies mispriced credit risk and the market, unfortunately, believed their ratings. *Id.* Any regulatory overhaul – national or internation in scope should, therefore, take into account the skewed incentives credit agencies currently have.

49. GLOBAL GOVERNANCE, *supra* note 9, at 233.

50. *Basel II Accord*, *supra* note 41, ¶ 11.

51. *Id.* ¶ 720.

52. *Id.* ¶ 809.

53. *Id.*

54. *Id.*

55. GLOBAL GOVERNANCE, *supra* note 9, at 260.

56. *Id.*

57. *Id.*

58. *Id.* at 261. Moreover, the Authors note, homogeneity is a growing problem outside of the banking regulations proposed by Basel II. *See id.* ("As financial markets become seamless . . . banks, securities firms, insurance companies, pension funds, and so on" are adopting standard analytical

markets will exaggerate the amplitude of the market's reaction to objective financial data resulting to increased systemic risk.[59]

The tendency of Basel II's first and third pillars to encourage dangerous homogeneity makes the second pillar, supervisory review of bank capital determination models, all the more important.[60] On this point, the Authors argue that the scope of the Basel Committee supervisors' regulatory discretion is too broad and may result in "inconsistent or ineffective standards."[61] In light of Basel II's institutional construction, the Basel Committee supervisor's are narrowly exposed to the risk-taker with inadequate consideration of those who are most vulnerable to the risk-taker's actions.[62]

The Author's posit a market-based approach to pricing and regulating the risk inherent in banking. In Chapter 9, *Reforming the Basel Accord and the Use of Subordinated Debt: Making Markets Work for the Regulator,* the Authors consider whether requiring banks to hold subordinated debt would increase market discipline.[63] These debt issuances would be "unsecured, uninsured, and junior to deposits."[64] This debt would create a class of "financially sophisticated class of creditors with better incentives for monitoring financial institutions" and the risk associated with their investments.[65] Ultimately, the Authors find that a subordinated debt requirement would provide banking regulators a strong, market based figure that would allow them to regulate risk more effectively.[66]

It is not just the Basel Committee and banking regulation that is flawed. In Chapters 2, 3, and 4 (i.e., *Global Governance and International Standard Setting, The International Legal Framework for International Financial Regulation,* and *International Soft Law and the Formation of Binding International Financial Regulation,* respectively) the Authors examine the current institutional and legal framework for financial regulation. The Authors find that the current system of

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principles in gauging risk.) By applying the same or similar rules in gauging risk, homogeneity becomes a factor affecting all financial systems falling to the same risk gauging fads. *Id.* As an example of this regulatory fad, the Authors quote the Chairman of the United Kingdom's Financial Services Authority, Sir Howard Davies as stating: "[o]ur general view is that the capital treatment should be the same, where the risks are the same." *Id.* Excessive reliance on quantitative models has been blamed for the collapse of equity markets in August 2007. David Rocker, Letter to the Editor, *Wall Street Borrows, Main Street Pays*, BARRONS, Sep. 17, 2007, http://online.barrons.com/article/SB118981089018628145.html ("Since most of these firms [using similar quantitative models] analyzed a common market history, a strong correlation of longs and shorts developed throughout the quant-fund industry. As more capital was deployed in the strategy, a self-reinforcing spiral was created: Demand for 'positive' stocks increased, boosting their prices, and selling in 'negative' stocks increased, pressuring their prices.").

59. *See* GLOBAL GOVERNANCE, *supra* note 9, at 261.

60. *Id.*

61. *Id.*.

62. *Id.*

63. *Id.* at 227.

64. *Id.*

65. *See id.*

66. *Id.* at 237.

international financial regulation is inadequate at addressing systemic risk.[67] Current "international regulatory efforts" amount to little more than "haphazard responses to specific crises that threaten" global financial stability.[68] Institutional regulatory bodies were designed to address specific economic issues, but necessity has forced them to expand their regulatory jurisdiction. For example, the International Monetary Fund, originally founded to "foster international trade and economic reconstruction in war-ravaged member countries,"[69] has expanded its original role, outside of its initial legal authority, to "setting standards for the management of systemic risk."[70] Because the IMF was not designed for this function, it is no surprise that it has "failed to accomplish the overall objective of effectively managing systemic risk." [71]

In Chapters 6 through 9, the Authors expand upon specific issues relating to their thesis. In Chapter 6, *Incentives versus Rules: Alternative Approaches to International Financial Regulation,* they opine upon the best means of regulation, weighing rule-based regulation against incentive-based regulation.[72] In Chapter 7, *The Economics of Systemic Risk in International Settlements,* the Authors consider a context in which a lack of incentive-based rules might increase the likelihood of systemic risk.[73] They posit that payment settlement systems are the "channels through which funds are transferred between financial institutions in the form of electronic debit and credit-book entries."[74] The key issue is whether payment systems should follow a collateralized overdraft system, which is favored in the European Union, or a non-collateralized overdraft system with fees charged for overdrafts, which the United Stated has adopted. [75] The Authors lean toward a collateralized overdraft system because it "internalizes the costs of risks in payments systems by reducing the threat of gridlock" that would occur in the case of a non-collateralized financial institution's failure and its impact on interconnected finance systems.[76]

In Chapter 8, *A Microeconomic Examination of Financial Fragility: A Test of Capital Adequacy Standards,* the Authors conduct a quantitative analysis of capital adequacy standards.[77] They find that rules-based capital adequacy standards appear to have led, especially in East Asia, cosmetic changes in capital ratios and other unintended consequences arising from regulatory efforts in those nations.[78]

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67. *See id.* at 32-33.
68. *Id.*
69. *Id.* at 84.
70. *Id.* at 93.
71. *Id.*
72. *See id.* at 181.
73. *See id.* at 184.
74. *Id.*
75. *Id.* at 185.
76. *Id.* at 200.
77. *See id.* at 201.
78. *See id.* at 225–26. These East Asian nations are Thailand, Indonesia, and South Korea. *Id.* at 202.

III. PROPOSED SOLUTION

The Authors provide two methods for addressing the problem of systemic risk. First, in Chapter 5, *Strengthening the Global Financial System through Institutional and Legal Reform*, they present guidance on addressing the problem through the creation, by way of treaty, of a Global Financial Governance Council ("GFGC").[79] Unlike most of the current international financial institutions ("IFI"), the GFGC would operate in full transparency and would provide "representatives from all states" to have authority in developing "international standards and rules for financial regulation to existing international supervisory bodies."[80] Overstretched IFIs like the IMF and World Bank should then return to their founding purposes instead of reaching into areas they are ill-equipped to regulate.

Second, at the close of the book in Chapter 11, *Summing Up and Conclusion: The New Financial Architecture – Promise or Threat?,* the Authors provide a more general proposal.[81] Here, the Authors present five specific guidelines for the international financial regulators of the future. First, regulators must increase financial heterogeneity.[82] This may be done by creating a regulatory body "with the powers to develop [a] flexible structure of rules and rule making."[83] Additionally, the Authors argue this body should have broad enforcement and monitoring powers.[84] Second, there should be an international lender of last resort.[85] However, the moral hazard associated with "liquidity without strings" must be tempered by "powerful rules on risk taking."[86] Third, a "new financial architecture should encompass macroeconomic concerns."[87] Fourth, the regulators' rules "need to make greater use of the new work on extreme, rare events."[88] Fifth, the scope of the regulators' activity should be the international market itself.[89]

Finally, in Chapter 10, *Enhancing Corporate Governance for Financial Institutions: the Role of International Standards,* the Authors focus on corporate governance issues. Consistent with their arguments throughout the book, the Authors argue that the role of financial regulators should be to promote the public good in light of principal-agent problems inherent when asymmetrical information disparities exists between management and other stakeholders in a bank or corporation.[90]

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79. *Id.* at 162.
80. *Id.* at 163.
81. *See id.* at 268.
82. *Id.* at 269.
83. *Id.*
84. *See id.*
85. *Id.* at 269.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *See id.* at 244.

IV. CONCLUSION

The United States Subprime Mortgage Crisis of 2007 presents another illustration of the need for an international regulatory response to the problem of systemic risk generated in international financial markets. As in the Asian Financial Crisis of the 1990s, the mortgage market of the mid-2000s in the United States was characterized by a "underpricing of risk" by lending institutions.[91] The subprime chicken came home to roost in 2007 with mortgagors defaulting on their loans in droves,[92] and a resulting homogenous panic from risky assets bearing these assets in their portfolio.[93] The effects soon spread to credit markets, with the end result a general freezing of credit markets.[94] With credit more costly, companies and individuals find it more difficult to borrow on the margin; the final impact: it is expected that economic growth world-wide will decelerate.[95] The broader impact of this American-originated financial crisis has yet to fully materialize; it is, however, evident that the crisis will have an adverse impact on the world economy, at the minimum through its direct impact on world credit markets.[96]

Federal Reserve Chairman Ben S. Bernanke has recently testified before the U.S. House of Representatives, stating that "[t]he recent problems in subprime lending have underscored the need not only for better disclosure and new rules but also for more-uniform enforcement in the fragmented market structure of brokers and lenders."[97] The United States Treasury Department has also recognized the problem and "is seeking public input on how to overhaul the way Washington oversees Wall Street, as the agency works to create a blueprint for a more-effective regulatory structure."[98] *Ex post* and narrowly tailored solutions to the systemic risk

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91. Feldstein, *supra* note 15.

92. Bob Ivry, *Half of 450,000 Subprime Mortgages Could Default*, CHI. SUN-TIMES, Sep. 23, 2007, at E7 ("[M]ore than a quarter of subprime borrowers [out of 450,000] default on their adjustable loans before the rates reset.").,

93. *Id.*

94. *See Is the Credit Crunch Finally Over?*, BBC NEWS, Sep. 20, 2007, http://news.bbc.co.uk/2/hi/business/7003139.stm.

95. *Id.* ("The tightening up of credit and worries about mortgage repayments may make everyone more nervous about borrowing money to buy big-ticket items like cars.").

96. *See* Carter Dougherty, *Ripple Effects from U.S. Mortgage Crisis hit Pacific Rim*, Int'l Herald Trib., Aug. 1, 2007, http://www.iht.com/articles/2007/08/01/business/stocks.php; *see, e.g.*, James Kanter, *Central Banks Act Again to Combat Subprime Crisis*, Int'l Herald Trib., Aug. 10, 2007, http://www.iht.com/articles/2007/08/10/business/subprime.php ("BNP Paribas, the large French bank, was freezing $2.2 billion held in three funds with exposure to U.S. subprime mortgages spark[ing] concerns that the risk was spreading well beyond America's shores.").

97. *Legislative and Regulatory Options for Minimizing and Mitigating Mortgage Foreclosures Before the H. Comm. on Fin. Services*, 110th Cong. 78 (2007) (Statement of Ben S. Bernanke, Chairman, Board of Govrns., Fed. Reserve System), *available at* http://www.federalreserve.gov/newsevents/testimony/bernanke20070920a.htm..

98. Deborah Solomon, *Treasury Seeks Input on Regulation Overhaul*, WALL ST. J., Oct. 11, 2007, http://online.wsj.com/article/SB119214182307756559.html.

created by the underpricing of risk in U.S. mortgage lending are inadequate. The Authors persuasively argue that the solution to the underpricing of risk and the systemic risk it generates requires an *ex ante,* systematic, and international regulatory response. Purely "domestic" reforms "will be inadequate if not accompanied by major institutional and legal reforms at the international level." [99] Without such international regulatory efforts, the failure of domestic regulators to require financial firms to properly price risk will provide fertile ground for the generation of more international financial crises. With domestic regulators at the forefront of financial regulation, we will likely see more "haphazard responses to specific crises that threaten" global financial markets.[100] The Subprime Crisis looming heavy on international financial markets, American and other financial regulators should consider the argument presciently and persuasively made in *Global Governance of Financial Systems.*

99. GLOBAL GOVERNANCE, *supra* note 9, at 3.

100. *Id.* at 32–33.